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FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-333

In re Applications of

PRISCILLA L. SCHWIER	File No. BPCT-860409KF
NEW LIFE EVANGELISTIC CENTER, INC.	File No. BPCT-860410KT
DOMINION BROADCASTING, INC.	File No. BPCT-860410KU

For Construction Permit for a New Television Station at Toledo, Ohio

Appearances

Jerold L. Jacobs, Howard J. Braun, and *Heidi P. Sanchez*, on behalf of Priscilla L. Schwier; *John H. Midlen, Jr.*, on behalf of New Life Evangelistic Center, Inc.; and *David D. Oxenford, Jr., Richard J. Bodorff*, and *Janet M. Evans*, on behalf of Dominion Broadcasting, Inc.

DECISION

Adopted: July 7, 1988; Released: July 20, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, ESBENSEN.

Board Member BLUMENTHAL:

1. This comparative broadcast proceeding involves the three remaining mutually exclusive applications of Priscilla L. Schwier (Schwier), New Life Evangelistic Center, Inc. (New Life), and Dominion Broadcasting, Inc. (Dominion) for authority to construct and operate a new television station on Channel 40 at Toledo, Ohio. By *Hearing Designation Order*, MM 6206, released August 11, 1986 (*Notice*, 51 Fed. Reg. 29308, published August 15, 1986), these applications (as well as three others subsequently dismissed) were designated for consolidated hearing on air hazard issues against all of the applicants, as well as on the standard comparative issue. Presiding Administrative Law Judge Richard L. Sippel (ALJ) resolved the air hazard issue specified against New Life favorably to that applicant by summary decision. *Memorandum Opinion and Order*, FCC 87M-190, released January 29, 1987. In an *Initial Decision*, 2 FCC Rcd 7153 (ALJ 1987) (*"I. D".*), after resolving the remaining air hazard issues favorably to Schwier and Dominion, *I. D.*, paras. 6-7, 40-45, the ALJ determined that Dominion comparatively outranked the other applicants, finding only Dominion to have no other attributable mass media ownership interests under the diversification factor and to be entitled to 100% quantitative credit for integration of ownership with management, both significant elements under the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (hereinafter " *Policy Statement*").

2. This proceeding is now before the Review Board on exceptions filed by the parties. We have reviewed the *I. D.* in light of the exceptions and briefs, the oral argument held April 22, 1988, and our independent examination of the record. We adopt the ALJ's findings of fact and conclusions of law, except as modified herein, and affirm his ultimate conclusion that a grant of the Dominion application is most consistent with the *Policy Statement* and governing precedent.

3. *Air Hazard Issues*. Each of the applicants obtained "no air hazard" determinations from the Federal Aviation Administration (FAA) either shortly before, during, or shortly after the hearing. Only New Life excepts to the ALJ's rulings under these issues, claiming that it alone had met the Commission's "good cause" and "foreseeability" requirements for engineering amendments, and that therefore Schwier and Dominion should be found technically disqualified for want of an acceptable transmitter site. In addition, New Life excepts to the ALJ's denial of its January 27, 1987 Motion for Leave to File and Motion for Summary Decision seeking summary decisions on the air hazard issues against its opponents because they had not obtained FAA clearance by the hearing exhibit exchange date in this proceeding. *See Order*, FCC 87M-313, released February 12, 1987. We deny these exceptions. A brief chronological overview of the facts pertaining to these issues as they relate to each applicant will illuminate the situation before us.

4. *Schwier*. Schwier's application, filed on April 9, 1986, reported that two days previously, on April 7, notification of proposed construction for her proposed antenna and tower had been sent to the FAA (Schwier Application, FCC Form 301, Section V-G, Page 17, Question 3). On June 6, 1986, Schwier's consultants requested a formal FAA study, and the FAA determined on August 19, 1986 that Schwier's 2249-foot above mean sea level (AMSL) proposal would constitute an air hazard, but reduction to 1349 feet AMSL would eliminate the air hazard. Schwier Petition for Leave to Amend, filed September 15, 1986, Att. A (FAA letter to Schwier received by her on August 25, 1986). On August 11, 1986, shortly before the FAA determination, and only some four months after the Schwier application was filed, the *HDO* in this proceeding was released designating an air hazard issue against each applicant. After determining that an FAA-acceptable height reduction at its present site would likely render her incapable of complying with the Commission's city-grade signal requirement, and after further conferring with the FAA and obtaining new assurance of site availability, Schwier on September 15, 1986 filed a Petition for Leave to Amend specifying a new site (originally proposed by a former applicant in this proceeding) with a proposed antenna height of 1349 feet AMSL. The Schwier petition was unopposed and was granted by the ALJ. *Order*, FCC 86M-2946, released September 30, 1986. Further correspondence between Schwier and the FAA ensued, Tr. 184, 187. On February 4, 1987, Schwier promptly filed another Petition for Leave to Amend reporting its receipt of the FAA's January 26, 1987 "no air hazard" determination.

See Schwier Exh. 2. (The petition was filed during the hearing, which was held February 3-6, 1987. *See I. D.*, para. 3.) By *Order*, FCC 87M-311, released February 11, 1987, the ALJ granted the Schwier petition, which, like its earlier site amendment, was unopposed.

5. In its exceptions, New Life argues that Schwier's September 15, 1986 site amendment was "not unforeseeable" because its original site was near several local airports and therefore the ALJ erred in accepting the amendment. New Life Br. at 20-21. It also urges that because Schwier did not submit its FAA "no air hazard" determination until after the hearing exhibit exchange date (January 20, 1987), Schwier should be adjudged to be in "default" on the air hazard issue and its application should therefore be denied. *Id.* at 21- 27. We deny these exceptions.

6. Initially, we note that New Life's attack on Schwier's amendment is belated because New Life did not file an opposition to acceptance of the amendment. Equally importantly, however, Schwier reasonably relied on her engineering consultant, and the FAA in fact *approved her original site*, but at a lower proposed antenna height. Thus, Schwier had no reason to believe, prior to the FAA's action, that she would not receive FAA clearance. Under these circumstances, we agree with the ALJ that her amendment was "unforeseeable" pursuant to 47 CFR §73.3522(b)(1). *See generally California Broadcasting Corporation*, 90 FCC 2d 800, 809 (1982). Further, we reject New Life's "default" argument. When it became evident at hearing that the FAA had not reached any air hazard determination with respect to any applicant prior to FCC hearing designation, which occurred only some four months after the applications were filed, the ALJ reasonably permitted each of the applicants to submit evidence of its FAA clearance at any time prior to the issuance of the *I. D. See* Tr. 923; *Order*, FCC 87M-323, released February 13, 1987. *See also Cuban - American Limited*, FCC Rcd 3264, 3265-3266 (Rev. Bd. 1987) (supporting ALJ discretion to accept FAA approval late in the hearing process). Schwier, who had promptly amended her site proposal on September 15, 1986 to respond to an FAA "air hazard" determination, submitted her FAA approval during the hearing on February 4, 1987, more than nine months before the ALJ's deadline for receipt of such approvals. After affording New Life "considerable leeway" to test Schwier's efforts to obtain FAA approval, *I. D.*, para. 43 (citing Tr. 162-188), the ALJ concluded that the delay from the September 30, 1986 acceptance of Schwier's site amendment until FAA issuance of a "no air hazard" determination on January 26, 1987 was due solely to the FAA, and not in any measure to Schwier. *Id.* Based on our review of the record, we fully agree with the ALJ. *See Commanche Broadcasting, Inc.*, 97 FCC 2d 1059, 1061-1062 (Rev. Bd. 1984); *cf. Music Sound Radio, Inc.*, 102 FCC 2d 1356, 1360 (Rev. Bd. 1986)(accepting post- *I. D.* FAA clearance). *Compare Mark L. Wodlinger*, FCC 88R-29, released June 1, 1988, paras. 14-23 (Rev. Bd.) [1]

7. *Dominion.* Dominion's application was filed on April 10, 1986 and reported that six days previously, on April 4, notification of proposed construction for its proposed antenna and site had been sent to the FAA. *See* Dominion Application, FCC Form 301, Section V-G, page 17. On May 27, 1986, the "B" cut-off date in this proceeding, Dominion amended its application, increasing its overall antenna height from 749 feet to 819 feet, and so notified the FAA. *See* Dominion Amendment of May 27, 1986, Section V-C, Page 14, Question 6 and Section V-G, Page 17, Question 3. On July 31, 1986, the FAA issued a notice stating that, since the proposal exceeded its obstruction standards, it was conducting an aeronautical study and was inviting public comment by August 31. *See* New Life Cross Exh. 1. On November 17, 1986, Dominion both received an FAA notice that the proposed site would present a hazard to air navigation and was advised by the Canadian government that the proposed site would cause interference. *See Memorandum Opinion and Order*, FCC 87M-189, released January 29, 1987. Dominion then consulted with its engineering and FAA consultants and was ultimately advised by them that its best course of action - to address the FAA and Canadian concerns and to avoid a perceived city-grade signal coverage problem - would be to change transmitter sites and use a directionalized antenna. By "Statements for the Record," dated December 1 and 17, 1986, Dominion notified the presiding officer and the competing applicants of its air hazard status and its plan to change transmitter sites. On December 29, 1986, it filed a motion for leave to amend proposing a new site, after appropriately notifying the FAA. By *Memorandum Opinion and Order*, FCC 88M-189, *supra*, the ALJ granted the Dominion petition, after considering New Life's opposition and finding that Dominion had demonstrated that its amendment was both necessitated by events which could not normally be foreseen, *citing* 47 CFR §73.3522(b)(1), and otherwise accompanied by "good cause," *citing Erwin O' Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970). Finally, in a petition for leave to amend filed on March 11, 1987, Dominion reported that, after submitting an "informational" response to additional FAA concerns and after multiple telephone conversations with that agency, the FAA ultimately issued it a "no air hazard" determination. The ALJ granted the March 11 petition, *Memorandum Opinion and Order*, FCC 87M-749, released April 6, 1987, and accepted into evidence as Dominion Exhibit 9 the FAA "no air hazard" determination. *See Order*, FCC 87M-838, released April 16, 1987. Ultimately, the ALJ held that each of the three instant applicants had met the FAA issue and was therefore technically qualified to be a Commission licensee. *I. D.*, paras. 6-7, 40-45.

8. In its exceptions, New Life claims that Dominion was not diligent in submitting its December 29, 1986 site amendment. In particular, New Life asserts that Dominion had been aware that New Life's own amendment of the preceding November 24 - proposing a reduction in antenna height in New Life's original site proposal, which was nearly identical to Dominion's original site proposal - was accompanied by an FAA clearance. Consequently, New Life claims that, since Dominion could have also proposed a height reduction to cure its FAA problem, it lacked "good cause" for instead proposing a completely different site requiring a new application for FAA clearance, and that the need for the site change amendment was also necessarily "foreseeable." [2] We deny these exceptions.

9. On December 4, 1986, Dominion commented on New Life's November 24, 1986 Motion for Leave to Amend and for Summary Decision, which proposed a reduction in antenna height and attached an FAA "no air hazard" determination, alleging that the reduced height, coupled with the need to eliminate Canadian interference, would require the addition of a city-grade signal coverage issue against New Life. These comments (and petition to enlarge issues) were supported by the affidavit of Domin-

ion's engineering consultant. Similarly, Dominion's engineering and FAA consultants specifically determined that an antenna height reduction at its own original site would be less likely to secure both FAA and Canadian clearance, without creating a new city-grade coverage problem, than would a move to a new site specified by its FAA consultant. (*See* Dominion Reply Br. at 2-3). Therefore, New Life's November 24 amendment did not vitiate the reasonableness of Dominion's decision to change sites. As the ALJ found (*I. D.*, para. 44), its need to amend could not reasonably have been foreseen, *see California Broadcasting, supra*. Furthermore, its prompt responsiveness to FAA notifications and its regular status reports to the ALJ, as detailed in paragraph 7, *supra*, demonstrate, contrary to New Life's contention, that it was consistently diligent throughout in its attempts, which were ultimately successful, to gain FAA clearance. *See Mary Ann S. Bohi*, 103 FCC 2d 1008, 1015 (Rev. Bd. 1986).

10. *Comparative Issue*. The ALJ found Dominion to be the only applicant with no attributable mass media ownership interests, *see I. D.*, paras. 8-11. In addition, he awarded it the maximum available 100% quantitative credit for integration of ownership and management, the only other comparative factor present in this case. Thus, only if the ALJ erred in these respects can his grant to Dominion be disturbed. We therefore focus on Schwier's and New Life's exceptions on these points.

11. *Diversification*. Neither Schwier nor New Life has excepted to the ALJ's recognition that Dominion has no attributable mass media ownership interests. *See I. D.*, paras. 11, 50. On the other hand, Schwier does not dispute that at the time of the hearing she was a 23.24% shareholder, as well as full-time president and a director, of Great Lakes Communications, Inc., the licensee of Station WICU(TV), Erie, Pennsylvania (located some 175 air miles from Toledo). *See I. D.*, paras. 8-9. She simply excepts to the magnitude of the "moderate" diversification preference awarded to Dominion, preferring instead that the term "slight-to-moderate" be used to describe her disadvantage. We need not engage in this semantic sparring. Precedent is clear, especially in view of Schwier's admitted more recent accession to 62.28% voting power in the licensee of Station WICU(TV), [3] that her diversification handicap is clearly decisional vis-a-vis Dominion. *See Signal Ministries, Inc.*, 104 FCC 2d 1481, 1497-1498, 1538-1539 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1259 (1987), *aff' d by judgment sub nom. Adelphi Broadcasting Corp. v FCC*, No. 87-1138 (D.C. Cir. February 8, 1988). The same is true for New Life, the undisputed licensee of two existing television stations. *See I. D.*, paras. 10, 49; *see also* New Life Br. at 27. In these circumstances, its request for a diversification *preference* (New Life Br. at 28) is without legal support. *See generally Policy Statement, supra*, 1 FCC 2d at 394-395. Its arguments being bereft of any "old life" (*i. e.*, precedent), we will decline to afford them New Life. Perhaps in the *next* life . . . .

12. *Integration*. Dominion is a non-stock, not for profit corporation, incorporated in 1986 in the State of Ohio. *I. D.*, para. 25. It has a three member board of trustees, and each trustee is a corporate officer and is proposed for a full-time station management role. *Id.*, paras. 25, 28. Larry D. Whatley, president, is the proposed general manager and will have complete control over station operations. Ronald L. Mighell, vice president, is Dominion's proposed operations manager and will oversee the station's departments, reporting to Mr. Whatley on the needs of each department and consulting with him on broadcast procedures. Jerry Toth, Dominion's secretary/treasurer, is the proposed program director for the station and will supervise the scheduling of production time, the production of station programs, and the acquisition and utilization of station equipment. *Id.* Each has significant managerial experience in the broadcast field. *Id.*, paras. 32, 34, 37. The ALJ awarded Dominion 100% ownership integration credit, *id.*, paras. 51-53.

13. In their exceptions, Schwier and New Life both urge that Dominion be given no integration credit because Dominion "lacks a concrete and viable organization structure." Schwier Br. at 21-24; *see also* New Life Br. at 30-32 (referring to "nebulous nature" of Dominion's structure). They stress that Dominion has no by-laws and no "member" class, and its articles of incorporation (and state certificate of incorporation) do not identify either the corporate officers or describe the corporate positions they will fill. *See* Schwier Br. at 22. It is further alleged that Dominion has not yet sought tax-exempt status, has no corporate record book, and "[m]ost likely no minutes of any meeting have ever been kept." *See* New Life Br. at 30-31.

14. We reject these contentions and affirm the ALJ's award of full integration credit to Dominion. In its application as originally filed on April 10, 1986, Dominion indicated that it is a "non-stock not-for-profit corporation" with three equal members of its governing board: Larry Whatley, "president" of Dominion; Ronald Mighell, "vice-president"; and Jerry Toth, "secretary/treasurer". Dominion Application, FCC Form 301, Section II, Questions 5 and 10. Previously, in Articles of Incorporation prepared on April 5, 1986, and "approved for filing" by the office of the Secretary of State of Ohio on April 7, 1986, Dominion was formed as a "not for profit" corporation under Ohio law and Mssrs. Whatley, Mighell, and Toth were listed as Dominion's sole trustees. *See* Dominion Reply Br., Appendix. As a nonprofit corporation governed by a three-person Board of Trustees, and having no "equity owners" in the sense that commercial entities do, it is undisputed that Dominion's ownership "integration" credit, in accordance with Commission practice, must be calculated by constructively equating its governing trustees with owners under the *Policy Statement*. *See Religious Broadcasting Network*, FCC 88R-38, released July 5, 1988, at para. 45 (citing *Reginald A. Fessenden Educational Fund*, 100 FCC 2d 440, 447, 451 (Rev. Bd. 1985), and *Farragut Television Corp.*, 5 FCC 2d 93, 97-99 (Rev. Bd. 1966), *modified*, 8 FCC 2d 279 (1967)).

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15. In its "Integration and Diversification Statement" filed on September 5, 1986, Dominion specified that each trustee holds a 33-1/3% interest in Dominion and will fill a full-time managerial role at the station: Whatley as general manager, having overall charge of station operations; Mighell as operations manager, overseeing the operation of the various station departments and reporting to the general manager on departmental needs, as well as consulting with him on broadcast procedures; and Toth as program director, supervising the scheduling of production time, the production of station programs, and the acquisition and the use of production equipment. Also specified were the trustees' individual qualitative attributes, including significant past experiences in broadcasting and management, and their commitments to resign from employment so as to be able to fulfill their station responsibilities. As the *I. D.* recounted, these representations

were repeated in Dominion's hearing exhibits and their oral testimony was fully consistent with them. Although Dominion's corporate documents were less than voluminous, we take instruction from the Commission's recent decision in *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988) where, reversing the Board, the Commission awarded "integration" credit to a corporate applicant whose organizational documents were equally scant. [4] Indeed, the *Victory Media* applicant's corporate documentation was in complete conflict as to basic corporate structure long after the deadline for freezing "integration" proposals, yet the Commission accepted the oral testimony of that applicant's witnesses as to its corporate structure. Here, no such patent conflict exists. Where, as here, an applicant's organizational documentation is essentially complete, evinces *bona fides*, and it "sets forth a specific integration proposal, does not depart from it, and provides reasonable assurance that it will be carried out, we will credit that proposal." *Bradley, Hand and Triplett*, 89 FCC 2d 657, 662 (Rev. Bd. 1982). We therefore affirm the award of 100% "integration" credit to Dominion.

16. With respect to the proposals of the other applicants, we see no compelling reason to disturb the ALJ's conclusion that Ms. Schwier could receive part-time "integration" credit only because she is the full-time president of the licensee of Station WICU(TV), Erie, Pennsylvania, and had not specifically shown how she could sufficiently curtail her WICU(TV) commitment and activities to enable her to devote at least 40 hours per week to the proposed Toledo station. The ALJ's analysis was thorough and supported by precedent. *See I. D.*, paras. 13-14, 17, 55; *Cuban - American Limited*, 2 FCC Rcd 3264, 3268-3269 (Rev. Bd. 1987). Nevertheless, even if Schwier were regarded *arguendo* as 100% "integrated", as well as qualitatively superior to Dominion, as she contends, and therefore entitled to a small "integration" preference over Dominion, Dominion's "diversification" advantage would here remain decisionally paramount. *See Payne Communications, supra*, 1 FCC Rcd at 1061 (slight integration demerit is outweighed by slight diversification demerit); *Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1112 (Rev. Bd. 1984). As for New Life, it is entitled at most to 7% full-time integration, which is decisionally far below that proposed by Dominion, *see I. D.*, para. 54; New Life Br. at 9-11, as well as a decisional diversification handicap, *see* paragraph 11, *supra*. [5]

17. Having considered all decisionally significant exceptions (as well as a few decisionally insignificant), we affirm the ALJ's ultimate conclusion that a grant of Dominion's application will best serve the public interest, convenience, and necessity.

18. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed on February 19 and May 3, 1988 by Priscilla L. Schwier ARE GRANTED, and the amendments ARE ACCEPTED; and

19. IT IS FURTHER ORDERED, That the applications of Priscilla L. Schwier (File No. BPCT-860409KF) and New Life Evangelistic Center, Inc. (File No. BPCT-860410KT) ARE DENIED, and the application of Dominion Broadcasting, Inc. (File No. BPCT-860410KU) to establish a new television station at Toledo, Ohio IS GRANTED subject to the conditions that:

(a) operation with visual effective radiated power in excess of 1000 kW is subject to the consent of Canada; and

(b) prior to the commencement of operation of the television station authorized herein, the permittee shall certify to the Commission that Ronald Mighell and Larry Whatley have divested themselves of all interest in, and connection with, the licensee of Station WTLW-TV, Lima, Ohio.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Moreover, the ALJ properly applied 47 CFR §1.251(a)(1) (motion for summary decision must be filed at least 20 days prior to date set for commencement for hearing) in denying New Life's January 27, 1987 Motion for Summary Decision on the air hazard issues against its opponents. The hearing began one week later, on February 3. *See* Ord er, FCC 87M-313, released February 12, 1987.

[2] New Life also claims that Dominion, like Schwier, "defaulted" on the air hazard issue. We deny this exception for the reasons given at paragraph 6, supra, where we addressed this identical argument in relation to Schwier. Dominion's FAA clearance was submitted in an amendment filed on March 11, 1987, some eight months before the ALJ-imposed deadline, which was the issuance date of the I.D.

[3] See Schwier Petition for Leave to Amend filed on May 3, 1988, reporting the consummation of a Commission-approved transfer of control of Great Lakes Communications, Inc., the license of WICU(TV), to Schwier.

[4] Pursuant to the Board's express invitation at oral argument, the applicants have each filed a supplemental brief addressing the relevancy, vel non, of the Commission's recent remand order in *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988), to Dominion's "integration" proposal. See Tr. of Oral Arg. at 1069, 1117, 1141. In reversing the Review Board's conclusion that the *Victory Media* applicant, a two-tiered (voting"/"nonvoting" stock) corporation, was a "sham", the Commission acknowledged that the applicant had an "informal" legal structure and lacked by-laws or other documents outlining how the corporation will operate. 3 FCC Rcd at 2074. Moreover, that applicant's certificate of incorporation reflected only on e class of stock, in flat contradiction to its critical claim of possessing two classes of stock. Notwithstanding these flaws, the *Victory Media* Commission accepted the testimony of the applicant's principals as to its corporate structure and awarded that applicant the "integration" credit it sought.

[5] We also deny New Life's "exception" - or, more accurately, "suggestion" - that "it is unlikely Dominion is financially qualified." See New Life Br. at 32-39. Not only is its exception wholly speculative, but New Life conceded at oral argument that it did not file a petition to enlarge issues on this point because it "did not have enough to back [it] up." Tr. of Oral Arg. at 1097- 1098. See generally 47 CFR §1.229(d)(motion to enlarge issues must "contain specific allegations of fact . . . supported by affidavits" of persons with knowledge). We therefore deny this "exception".

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-308

In re Applications of

REAL LIFE EDUCATIONAL FOUNDATION OF BATON ROUGE, INC. (hereafter Real Life)	File No. BPED-840322CA
JIMMY SWAGGART MINISTRIES (hereafter Swaggart)	File No. BPED-840822IF
RADIO FOR THE BLIND & PRINT HANDICAPPED, INC. (hereafter Radio)	File No. BPED-840822IG

For Construction Permit for a New
Noncommercial Educational Broadcast Station in
Baton Rouge, Louisiana
Channel 203C2 (88.5 MHz)

HEARING DESIGNATION ORDER

Adopted: June 15, 1988 **Released: July 20, 1988**

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, has under consideration the above-captioned mutually exclusive applications.

2. *Real Life*. Where applicants for a new broadcast station propose to employ five or more fulltime employees, 47 C.F.R. § 73.2080 requires those applicants to submit equal employment opportunity (EEO) programs with their applications. Section VI of FCC Form 340 specifies the use of a five-point point format set out in FCC Form 396-A. The EEO program supplied by Real Life is deficient for failure to include within Part IV an adequate example of a woman's organization which will be used to effectuate its EEO program. Accordingly, Real Life will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

3. Applicants for new broadcast stations are required by 47 C.F.R. § 73.3580 to give local notice of the filing of their applications. We have no indication that Real Life published the required notice. To remedy this deficiency, Real Life must publish local notice of its respective applications, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

4. *Swaggart*. On January 13, 1988, the FM Branch dismissed Swaggart's application pursuant to 47 C.F.R. § 73.3566(a) for failing to request a waiver of 47 C.F.R. § 73.509 to receive objectionable interference within 1.5% of its protected (60 dBU) contour from FM Station WRBH (New Orleans, Louisiana). The dismissal letter specifically afforded Swaggart an opportunity to resubmit a corrected application within 30 days and request reacceptance *nunc pro tunc*. Swaggart thereafter timely filed an amendment eliminating this interference on February 12, 1988, and requested *nunc pro tunc* reacceptance of its application. Pursuant to the Commission's "Statement of Future Policy on Incomplete and Patently Defective AM & FM Construction Permit Applications," 49 Fed. Reg. 47331 (1984), *recon. denied* 57 RR 2d 1603 (1985), Swaggart's application is reaccepted *nunc pro tunc*.

5. On January 31, 1986, Cosmos Broadcasting Corporation, licensee of television Channel 6 station WDSU (New Orleans, Louisiana), filed an informal objection against Swaggart's proposal, alleging that Swaggart's application misapplied the procedures required by 47 C.F.R. § 73.525 governing television channel 6 protection. Since Swaggart amended its application as noted in paragraph 4 hereinabove, its proposal complies with the provisions of § 73.525. Accordingly, Cosmos Broadcasting's objection will be dismissed as moot.

6. On February 21, 1986, Swaggart petitioned for leave to amend its application regarding its proposal concerning protection to WDSU-TV. The accompanying amendment was filed after October 25, 1985, the last day for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

7. *Radio*. An engineering study reveals a discrepancy between the 105.3 meters listed for the antenna height above average terrain (HAAT) in Section V-B, Item 6 and the 108.5 meters calculated for the average of the 72 radials listed in Figures 9 and 10 of the engineering exhibit. This discrepancy does not affect the acceptability of Radio's application since the use of either value for the antenna height above average terrain does not result in any violation of our technical acceptance rules. Consequently, Radio will be required to amend to correct the HAAT value in Section V-B, Item 6.

8. *Other Matters*. In pertinent part, 47 C.F.R. § 73.509(a) states that no application for a reserved band channel will be accepted if it would receive interference within its 1 mV/m contour from any co-channel or adjacent channel station. Both Real Life and Radio indicate that they would receive interference from first-adjacent channel (204) station KRVS, Lafayette, Louisiana. Real Life claims it would receive interference to 4.999% of its protected service contour, and Radio claims a figure of 3.24% interference received. Both note that the area of interference consists of uninhabited swampland, and are willing to accept this interference. As stated in the *Memorandum Opinion and Order* in Docket 20735, 50 Fed. Reg. 27954 (1985), at paragraph 56, the Mass Media Bureau has the authority to waive 10% or less of interference received by noncommercial educational FM applicants willing to

accept such interference and able to provide sufficient justification for grant of a waiver of § 73.509. Under the circumstances presented, we believe waivers are warranted.

9. None of the applicants have indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency, and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed Reg. 49560 (1978). It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement themselves.

10. Inasmuch as this proceeding involves competing applicants for noncommercial educational facilities, the areas and populations aspect of the standard comparative issue will be modified in accordance with the Commission's prior action in *New York University*, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

11. Except as indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding, on the issues specified below.

12. Accordingly, IT IS ORDERED, That pursuant to 47 U.S.C. § 309, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and if so, the terms and conditions thereof; (b) the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

2. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Real Life must submit an amendment with the presiding Administrative Law Judge remedying the deficiency in its proposed EEO program noted above in paragraph 2.

14. IT IS FURTHER ORDERED, That Real Life shall file with the presiding Administrative Law Judge within 30 days of the release of this Order an amendment stating it has or will comply with the local notice provisions of Section 73.3580(c).

15. IT IS FURTHER ORDERED, That Swaggart's request for *nunc pro tunc* reacceptance IS GRANTED.

16. IT IS FURTHER ORDERED, That the objection filed by Cosmos Broadcasting Corporation against Swaggart IS DISMISSED AS MOOT.

17. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Swaggart IS GRANTED, and the accompanying amendment IS ACCEPTED to the extent indicated herein.

18. IT IS FURTHER ORDERED, That Radio shall file with the presiding Administrative Law Judge an amendment of Section V-B, Item 6 of its application within 30 days of the release of this Order.

19. IT IS FURTHER ORDERED, That the requests by Real Life and Radio for waiver of the interference provisions of Section 73.509(a) of the Commission's Rules ARE GRANTED.

20. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **August 10, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, shall give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-335

In re applications of

MORRIS COURTRIGHT, JR., AND PHYLLIS J. COURTRIGHT (hereafter Courtright)	File No. BPH-870501MA
RAP BROADCASTING CORPORATION (hereafter Rap)	File No. BPH-870506MB
MICHAEL D. MAHAFFEY (hereafter Mahaffey)	File No. BPH-870506MD
SINCLAIR TELECABLE, INC. (hereafter Sinclair)	File No. BPH-870506KA
SEDONA FM BROADCAST LIMITED PARTNERSHIP (hereafter Sedona Ltd.)	File No. BPH-870506MC

For a Construction Permit
for a New FM Station on Channel 298C
in Sedona, *Arizona*

HEARING DESIGNATION ORDER

Adopted: June 20, 1988 **Released: July 20, 1988**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Environmental. Each of the applicants proposes to locate their antennas within 300 meters of the existing antennas for KAFF-FM, KMGN-FM, KNAZ-TV, KKTM-TV and the application of KQST-FM. Our study indicates that the combined operation of the existing stations and each of the proposals may significantly exceed the radiofrequency radiation guidelines under 47 C.F.R. § 1.1307(b). Accordingly, the applicants are required to amend their applications within 30 days of the date of this Order to demonstrate compliance with the RF radiation guidelines. The cumulative effect of the proposed operation and all nearby RF sources must be considered. Since the proposals of the applicants may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, the applicants are required to submit the environmental impact information described in § 1.1311. Accordingly, the applicants will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon.* denied *sub. nom., Old Pueblo Broadcasting Corporation*, 83 FCC 2d 337 (1980).

3. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Rap has not completed Item 4 correctly. Rap's application gives a post office box number as the residence address for Margaret C. (Peggy) Durham, Thomas E. Inch, Roger Blaemire, and Arthur James. Accordingly, Rap must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days after this Order is released.

4. *Mahaffey*. Mahaffey's proposal indicates that more than 80% of the area and population of Sedona is predicted to receive greater than a 3.16 mVm field strength signal pursuant to the methods described in NBS Technical Note Number 101, *Transmissional Loss Predictions for Tropospheric Communic - ations Circuits* (1967). Out of an abundance of caution, Mahaffey has requested a waiver of 47 C.F.R. § 73.315(b) (sic). The Commission's staff does not require waiver of 47 C.F.R. § 73.315(a) unless the proposed 70 dBu coverage falls below 80% of the principle community area. *See John R. Hughes*, 50 Fed. Reg. 5679 (Feb. 11, 1985). *See also A. B. C. D. Broadcasting Co.*, 2 FCC Rcd 6551 (1987) (Hearing Designation Order). Consequently, waiver of 47 C.F.R. § 73.315(a) is unnecessary and the acceptability of his application on this basis is not affected.

5. *Sedona Ltd.* (a) Exhibit 3 to Sedona Ltd.'s application indicates that Jeanette Ester Davis, the sole general partner of Sedona Ltd., is an employee of Resorts Broadcasting, licensee of KAFF (AM/FM), Flagstaff, Arizona. Flagstaff is located less than 25 miles from the instant class C proposal. Ms. Davis has pledged to resign her position in the event the instant proposal is granted. Accordingly, in the event Sedona Ltd.'s application is granted, Ms. Davis will be required to resign her employment wth Resorts Broadcasting and dispose of all her interest in station KAFF(FM), Flagstaff, Arizona

(b) On July 23, 1987, Sedona Ltd. filed a timely amendment changing its organizational structure from a general to a limited partnership. The amendment identified the general and limited partners, their respective equity interests and stated that the agreement "insulates limited partners and principals from any role in the day to day operation of the partnership or any media properties it may acquire or be awarded." In *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *recon. granted in part* 58 RR2d 604 (1985), the Commission stated that limited partnership interests were not attributable for the

purposes of the multiple ownership rules if the applicant certified that the limited partners will "not be involved in any material aspect in the management or operation of" the proposed staton. *Attribution*, at 1023. The Commission defined the requisite degree of noninvolvement in paragraphs 48-50 of the reconsideration. Sedona, Ltd. has submitted the necessary certification restricting the role of its limited partners. However, since the Commission retained the cross-interest policy as to other attributable media interests in the same area (*Attribution*, at 1030), Sedona Ltd. will be required to state whether the limited partners have other media interests subject to the cross-interest policy and if so identify the other local media and state the nature or extent of the ownership interest.

6. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Courtright, Mahaffey and Sedona Ltd. would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

7. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any compara- tive advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Mahaffey	9/29/87; 12/30/87; 3/29/88
Sinclair	11/17/87

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with regard to all of the applicants herein in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by §§ 1.1301 - 1319 of the Commssion's Rules.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Courtright, Mahaffey or Sedona, Ltd. would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That within 30 days of the release of this" Order, all applicants herein shall submit the environmental assessment" required by § 1.1311 to the presiding Administrative Law Judge, with a copy" to the Chief, Audio Services Division." "

11. IT IS FURTHER ORDERED, That Rap shall submit an amendment which" contains the information required by Section II, Item 4 of FCC Form 301," to the presiding Administrative Law Judge within 30 days after the release" of this Order."

12. IT IS FURTHER ORDERED, That, in the event of a grant of the application of Sedona, Ltd., the construction permit shall contain a condition that program tests will not be authorized until the permittee has shown that Jeannette Ester Davis has resigned her position with Resorts Broadcasting and divested herself of all interests in and severed all connections with KAFF(FM), Flagstaff, Arizona.

13. IT IS FURTHER ORDERED, That, Sedona Ltd., shall file the amendment called for in paragraph 4(b), above, with the presiding Administrative Law Judge, within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the Mahaffey and Sinclair ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

16. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later tnan **August 9, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-336

In re Applications of

ARCHON BROADCASTING LIMITED PARTNERSHIP (hereafter Archon) File No. BPH-870429MC

ROBERT WILLIAM MARTIN ET AL., d/b/a LAKE COUNTRY BROADCASTING. (hereafter Lake) File No. BPH-870430OH

For a Construction Permit
for a New Station on Chanel 253A in
Waterloo, New York

HEARING DESIGNATION ORDER

Adopted: June 20, 1988 **Released: July 20, 1988**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by the applicant elow would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding. *APPLICANT* : Lake

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Lake would constitute a hazard to air navigation.

2. To determine, which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

6. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **August 9, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief,
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-337

In re Applications

WCND, INC. (hereafter WCND)	File No. BPH-870514MJ
CSW, LTD. (hereafter CSW)	File No. BPH-870515MS
WAYNE LOUIS WILSON (hereafter Wilson)	File No. BPH-870515NO

For a Construction Permit
For a New FM Facility
In Shelbyville, Kentucky
On Channel 267A

HEARING DESIGNATION ORDER

Adopted: June 21, 1988; Released: July 19, 1988

By the Chief, Audio Services Division

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *WCND.* Pursuant to Section IV of FCC Form 301, applicants are required to submit a brief description, in narrative form, of the planned programming service. WCND states in Section IV that the required Programming Statement is submitted as Exhibit IV. WCND's application, however, contains no Exhibit IV. WCND will therefore be ordered to file within 30 days of the release of this Order a narrative statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

3. WCND is proposing to sidemount its antenna on the tower of AM station WCND. The applicant has indicated in the instant application that it has filed corrected coordinates for co-located AM Station WCND. The applicant has demonstrated FAA approval for this correction. However, the Commission's AM Branch has not yet received official notice of this correction. The applicant accordingly must file with the AM Branch a FCC Form 301 specifying the corrected coordinates for WCND(AM) within 30 days of the release of this Order.

4. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. WCND has not completed Item 4 correctly. WCND's application gives a post office box number as the residence address of J. B. Crawley and Elizabeth Crawley. Accordingly, WCND must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days after this Order is released

5. *Other Matters.* Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That WCND submit with the presiding Administrative Law Judge a proposed programming statement, in narrative form, within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That WCND file FCC Form 301 with the Commission's AM Branch correcting the coordinates for station WCND(AM) within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That WCND shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **August 9, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-339

In re Applications of

RICHARD L. CULPEPPER (hereafter: Culpepper) — File No. BPH-870612MB

GOLBAR BROADCASTING CO. LIMITED PARTNERSHIP (hereafter: Golbar) — File No. BPH-870615MN

For a Construction Permit
for a New FM Station on Channel 300A
in Muskegon, Michigan

HEARING DESIGNATION ORDER

Adopted: June 22, 1988 **Released: July 19, 1988**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Golbar.* Golbar proposes to sidemount its antenna on the existing broadcast tower of WLCS-FM. According to the Commission's data base, the accepted coordinates for this tower are 43-16-3 *4* /86-14-45. In its application, Golbar lists the coordinates for this tower as 43-16-3 *9* /86-14-45. Since Golbar clearly proposes to locate on an existing tower licensed to another Commission licensee, and since specific reference is made to this tower in various places in Golbar's application, the Commission could, "drawing on the application as a whole," confidently verify the transmitter location by taking official notice of the site coordinates found in the Commssion's files for the licensed colocated facility. Accordingly, Golbar's application is found to be acceptable for filing; however, Golbar is required to file corrected tower coordinates within 30 days of the release of this Order.

3. Golbar petitioned for leave to amend its application on January 14, 1988. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

4. *Areas and Populations.* Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. *Air Hazard.* The FAA has determined that the antenna proposed by Culpepper constitutes a hazard to air navigation. An issue with respect thereto will be specified below. Additionally, attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Golbar have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Golbar would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: Golbar, Culpepper

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That Golbar is to file corrected tower coordinates within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Golbar IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later tnan **August 9, 1988,** file with the Commission, in tripli-

cate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] The application of Shoreline Broadcast Partnership (BPH-870615MR) was returned on July 28, 1987, prior to designation. Shoreline has not filed a timely petition for reconsideration.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-338

In re Applications of

WYAL RADIO, INC. (hereafter WYAL)	File No. BPH-870331MP
MICHAEL RONALD BLAND (hereafter Bland)	File No. BPH-870331NX
ERVIN L. HESTER ET AL. D/B/A HOLY SPIRIT FM PARTNERSHIP (hereafter Spirit)	File No. BPH-870422MF

For a Construction Permit for a New FM Station on Channel 274(A) in Scotland Neck, North Carolina

HEARING DESIGNATION ORDER

Adopted: June 22, 1988 **Released: July 19, 1988**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Spirit*. Holy Spirit FM Limited Partnership is an applicant for a new commercial FM broadcast station to be licensed to Raleigh, North Carolina and a new FM broadcast station to be licensed to Fort Valley, Georgia. In its application, Spirit references Holy Spirit FM Limited Partnership but does not state the nature of the relationship, if any, that exists between the general partnership and the limited partnership. Accordingly, Spirit will be required to amend its application to disclose the connection, if any, between Holy Spirit FM Partnership and Holy Spirit FM Limited Partnership. Such amendment must be filed with the presiding Administrative Law Judge within 30 days of the release of this Order.

3. *WYAL*. WYAL Radio, Inc. is the licensee of radio station WYAL(AM), Scotland Neck, North Carolina. WYAL Radio, Inc., John Laurino, and E. E. Willey, Jr. have stated they will divest themselves of any interest in or connection with radio station WYAL(AM) in the event that WYAL's application for a new FM station in Scotland Neck, North Carolina is granted. Accordingly, an appropriate condition will be specified below.

4. *Bland*. Bland petitioned for leave to amend its application on August 22, 1987. The accompanying amendment was filed after June 15, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by the applicant below would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding. *APPLICANT* : Spirit

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: Spirit

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That in accordance with paragraph 2 hereinabove, Spirit shall file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That in the event of a grant of the WYAL application, the construction permit shall be conditioned as follows:

Prior to the commencement of the station authorized herein, the permittee shall certify to the Commission that it has divested all interest in the ownership of radio station WYAL(AM), Scotland Neck, North Carolina.

11. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Bland IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than August 9, 1988, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 0 of
the Commission's Rules

ORDER

Adopted: June 21, 1988 **Released: July 19, 1988**

1. The Commission has established a policy on private printing of blank FCC forms. This was done to provide guidelines to companies which elect to print the forms at their own expense as a convenience to their clients or consumers.

2. The Commission is creating a new rule section to codify this policy. Section 0.409 will specify the requirements and restrictions necessary to conform to the policy.

3. Authority for this action is contained in Section 4(i) of the Communications Act of 1934, as amended, and Section 0.231(d) of the Commission's Rules. Since this amendment is procedural in nature, the notice and comment procedure and effective date provisions of 5 U.S.C. 553 do not apply.

4. Accordingly, IT IS ORDERED, THAT Part 0 of the Rules is AMENDED in accordance with the attached appendix, effective on the date of publication in the *Federal Register*.

5. For further information on this matter contact Terry Johnson at (202) 634-1535.

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Minkel
Managing Director

List of Subjects in 47 CFR Part 0 Printed Publications

APPENDIX

Part 0 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 0 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Implement: 5 U.S.C. 552, unless otherwise noted.

PART 0 - [AMENDED]

2. A new Section 0.409 is added to read as follows:

Section 0. 409 Commission Policy on Private Printing of FCC Forms

The Commission has established a policy regarding the printing of blank FCC forms by private companies if they elect to do so as a matter of expediency and convenience to their clients or consumers. The policy is as follows:

(a) Blank FCC forms may be reproduced by private companies at their own expense provided the following conditions are met:

(1) Use a printing process resulting in a product that is at least comparable in quality to the original document, without change to the page size, image size, configuration of pages, folds or perforations, and matching as closely as possible the paper weight, paper color and ink color.

(2) Delete in its entirety any and all U. S. Government Printing Office (GPO) indicia that may appear in the margin(s).

(3) If the printer wishes to identify a foreign country in which the forms are printed, a marginal notation must be added stating "No U. S. Government funds were used to print this document."

(4) Do not add to the form any other symbol, word or phrase that might be construed as personalizing the form or advertising on it.

(5) Except as specified above, do not delete from or add to any part of the form, or attach anything thereto.

(6) Assure that the form being reproduced is an edition currently acceptable by the Commission, which will endeavor to keep the public advised of revisions to its forms, but cannot assume responsibility to the extent of eliminating any element of risk against the use of obsolete forms.

(b) These guidelines do not apply to forms which respondents may wish to reproduce as completed facsimiles on automated equipment to satisfy application or report requirements. Requests for permission to submit such forms to the Commission should be addressed to the Office of Managing Director.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,

Complainant,

v.

PACIFIC NORTHWEST BELL TELEPHONE COMPANY, File Nos. E-87-80

NORTHWESTERN BELL TELEPHONE COMPANY, E-87-82

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, E-87-83

Defendants.

ORDER

Adopted July 5, 1988; Released: July 19, 1988

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On June 30, 1987, AT&T Communications (AT&T) filed formal complaints against, *inter alia*, the US West telephone companies identified above. The complaints alleged certain statutory and tariff violations associated with defendant's billing and collection rates for the period July 1, 1985, to December 31, 1986.

2. The parties have conducted discussions, including consultations with members of the Enforcement Division, aimed at settling the complaints. A mutually agreeable settlement of all pending controversies between the parties was reached. On April 26, 1988, counsel for AT&T and the US West companies filed a joint motion seeking dismissal of the complaints with prejudice and authorization of their settlement agreement. We are satisfied that dismissal of these complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the proposed settlement agreement of the parties IS AUTHORIZED.

4. IT IS FURTHER ORDERED that the joint motion to dismiss the above- referenced complaints IS GRANTED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,

Complainant,

v.

CONTINENTAL TELEPHONE COMPANY OF ARKANSAS,	File No. E-88-3
CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA,	File No. E-88-4
CONTINENTAL TELEPHONE COMPANY OF IOWA,	File No. E-88-5
CONTINENTAL TELEPHONE COMPANY OF MINNESOTA,	File No. E-88-7
and	
CONTINENTAL TELEPHONE COMPANY OF NORTH CAROLINA,	File No. E-88-8

Defendants.

ORDER

Adopted July 5, 1988; Released: July 19, 1988

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 30 and October 20, 1987, AT&T Communications (AT&T) filed the above-captioned formal complaints, alleging that the defendants' earnings for interstate access services for the period October 1, 1985, through December 31, 1986, exceeded the authorized rate of return established by the Commission in *Authorized Rates of Return for Interstate Services for AT & T and Exchange Telephone Carriers*, CC Docket No. 84-800, Phase I, FCC 85-257 (released September 30, 1985) (*Phase I Order*), *modified on* recon., FCC 86-114 (released March 24, 1986), further recon., FCC 86-544 (released Jan. 14, 1987). At the request of AT&T, service of the complaints was deferred pending resolution of an appeal to the United States Court of Appeals for the District of Columbia Circuit of the automatic refund enforcement rule adopted in the Phase I Order. On January 22, 1988, the Court remanded the case to the Commission for further consideration. American Telephone and Telegraph Co. v. FCC, No. 85-1178, slip op. (D.C. Cir. January 22, 1988). On April 22, 1988, AT&T filed amended complaints taking into account the Court's decision. Subseqently, on June 1, 1988, AT&T submitted a letter to the Commission stating that the parties have satisfactorily resolved the matters in controversy and further requesting permission to withdraw the complaints with prejudice.

2. We have carefully reviewed this matter and find that granting AT&T's request would be in the public interest.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the above- captioned complaints ARE DISMISSED with prejudice and these proceedings ARE HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-32

In the Matter of

Amendment of Section 73.202(b),	RM-5006
Table of Allotments,	RM-5040
FM Broadcast Stations.	RM-5041
(Greenwood, Seneca, Aiken and	RM-5217
Clemson, South Carolina, and	RM-5300
Biltmore Forest, North Carolina)	

ERRATUM

Released: July 19, 1988

On July 5, 1988, the Commission released a Memorandum Opinion and Order (FCC 88-199) in the captioned proceeding. In the second line of paragraph 6, some text was inadvertently omitted. Therefore, the first sentence is set forth below in its entirety:

> Commission practice is generally to deny allocation requests in situations where the principal city coverage requirement of Section 73.315(a) cannot be complied with. *See , e. g., Wadley and Dadeville, Alabama, 51 FR 24351, July 3, 1986; New Boston, Ohio,* 48 RR 2d 1628 (1981); and *Attica, New York,* 54 FCC 2d 1137 (1975).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-306

In re Applications of

HENRY R. MALLOY, JR. d/b/a REM MALLOY BROADCASTING (hereafter Rem Malloy)	File No. BPH-860627MH
PEEBLES BROADCASTING COMPANY (hereafter Peebles)	File No. BPH-860703ME
JAMES S. LEE AND DONALD L. BAKER d/b/a INTERACTIVE MEDIA (hereafter Interactive Media)	File No. BPH-860707MS
RALEIGH FM LIMITED PARTNERSHIP (hereafter Raleigh FM)	File No. BPH-860707MV
FM CAROLINA, INC. (hereafter FCI)	File No. BPH-860707MX
FREE AIR CORPORATION (hereafter Free Air)	File No. BPH-860707NH
BRIAN C. BLOUNT, EVELYN V. GARNER, CLYDE AUSTIN & CHARLES HARRISON d/b/a BCB ENTERPRISES (hereafter BCB)	File No. BPH-860707NJ
CLEAR CHANNEL COMMUNICATIONS, INC. (hereafter Clear Channel)	File No. BPH-860707NV
BERNARD DAWSON (hereafter Dawson)	File No. BPH-860707NW
HOLY SPIRIT FM LIMITED PARTNERSHIP (hereafter Holy Spirit)	File No. BPH-860707NX
LPNC, INC. (hereafter LPNC)	File No. BPH-860702MC (PREVIOUSLY DISMISSED)
SPECIAL MARKETS MEDIA, INC. (hereafter Special Markets)	File No. BPH-860703MH (PREVIOUSLY DISMISSED)
COFIELD BROADCASTING COMPANY, INC. (hereafter Cofield)	File No. BPH-860703MM (PREVIOUSLY DISMISSED)
FM RALEIGH LIMITED PARTNERSHIP (hereafter Cofield)	File No. BPH-860707MY (PREVIOUSLY DISMISSED)
WILLOWBROOK BROADCASTING LIMITED (hereafter Willowbrook)	File No. BPH-860707NM (PREVIOUSLY DISMISSED)

For Construction Permit for a
New FM Station on Channel 275A
(102.9 MHz), Raleigh, North Carolina

HEARING DESIGNATION ORDER

Adopted: June 13, 1988; Released: July 19, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[12]

2. *Preliminary Matters.* On August 14, 1987, Cofield filed a petition for reconsideration of the action of the Chief, FM Branch returning its application as unacceptable for filing based on a preliminary engineering study which revealed that the proposed facilities would be 1.9 kilometers short-spaced to the 16 kilometer buffer zone afforded to second-adjacent channel station WAKG, Danville, Virginia, in violation of 47 C.F.R. § 73.207, in light of the requirement imposed under *Memorandum Opinion and Order in BC Docket 80 - 90*, 97 FCC 2d 279, 283 (1984)(MO&O). No waiver request had been included in the application as originally tendered.

3. In support of its petition, Cofield contends that it was not required to observe the buffer zone requirement under 5 U.S.C. § 552 (a)(1)(C)-(D) of the Administrative Procedures Act because as of the date of filing its application –July 3, 1986– clarification of the *MO & O*, *supra*, under *Spacing Requirement in Effect Until March 1, 1987 Pursuant to Docket 80 - 90*, 51 Fed. Reg. 26010 (July 18, 1986), had not been published. We reject this contention. In the *MO & O*, *supra*, the Commission provided existing Class C stations operating with an antenna height above average terrain (HAAT) of less than 300 meters, such as WAKG, an additional 16 kilometers spacing protection. As the

Commission reminded applicants in its *Public Notice* released April 9, 1985, "all commercial applications for FM allotments adopted on or after March 1, 1984 must meet the minimum distance separations specified in section 73.207 *plus* an additional 16 kilometers to existing Class C Stations with the buffer zone." This protection has been consistently afforded to qualifying Class C stations during the three year "grace period" until a superseding license to move on downgrade is filed. *See Stevens Point Communications Corp.*, 2 FCC Rcd 1747 (1987) (HDO). Although the Commission reiterated the buffer zone provision in *Spacing Requirement, supra*, applicants for new station have been held obligated to comply with the additional spacing requirement since March 13, 1984. In light of the foregoing, Cofield has failed to demonstrate that the staff erred in returning its application. Consequently, its petition for reconsideration must be denied.

4. *LPNC, Special Markets, FRLP and Willowbrook.* The above applicants timely filed petitions for reconsideration of the action of the Chief, FM Branch, returning their applications as unacceptable for filing based on preliminary engineering studies which revealed that the proposed facilities would be short-spaced to the 16 kilometer buffer zone afforded second- adjacent channel WAKG, Danville, Virginia, pursuant to the *Memorandum Opinion and Order* in Docket 80-90. No waiver request had been included in any of these applications as originally tendered.

5. In support of their respective petitions, the applicants first contend that it was unnecessary to observe the buffer zone because the actions of the protected station, WAKG, made clear that the buffer zone had been relinquished. Alternatively, the applicants argue that the buffer zone cannot be fully utilized by WAKG because of the 169 kilometer separation it must maintain with respect to first adjacent Class A station WDKS, Dunn, North Carolina. The petitioners therefore conclude that any short-spacing to the abbreviated, "usable" buffer zone, is eliminated. We reject these contentions. Although the petitioners attempt to rely upon *Orlando FM Group Limited Partnership*, 2 FCC Rcd 4691 (1987) (*Orlando),* the facts in that case are distinguishable from the present circumstance. In *Orlando*, 33 of 48 applicants proposed facilities which were short-spaced to the buffer zone for second adjacent Class C station WKTK, Crystal River, Florida. Station WKTK, however, had modified its facilities and filed a license to cover at a new site prior to the opening of the Orlando filing window, which site produced no short-spacing to any of the Orlando applicants. By having commenced operation at the new, fully spaced site, the buffer zone accorded WKTK's former site ceased to exist because that site had been relinquished. In the present case, however, the petitioners attempt to establish that a similar relinquishment occurred based upon the letter submitted by the licensee of WAKG in connection with a prior Rule Making for Lake View, South Carolina, which indicated that, as of January 31, 1986, that licensee had no intention of "mov[ing] its transmitter any closer to Cheraw, South Carolina, than it is now." LPNC's petition at Appendix B. The assurances given in that letter, however, on behalf of a party to the Lake View, South Carolina Rule Making, are of no significance to the present case. Furthermore, because WAKG did not relinquish its site, the buffer zone could not be deemed nonexistent as in *Orlando*.

6. Finally, the petitioners' assertion that WAKG's buffer zone cannot be utilized fully because it must protect WDKS, Dunn, North Carolina, is also without merit. The Commission has held that it will not ordinarily consider existing constraints which would create short-spacing should the stations protected by the buffer zone decide to move, since those constraints could disappear during the life of the buffer zone and thus permit the move. *See Corydon Broadcasting Limited*, 2 FCC Rcd 7521 (1987); *MO & O*, MM Docket No. 84-231, FCC 86-55, released January 27, 1986, at n.4. In light of the foregoing, LPNC, Special Markets, FRLP and Willowbrook have failed to demonstrate under 47 C.F.R. § 1.106 that the staff erred in returning their applications. Consequently, their respective petitions for reconsideration must be denied.

7. *Rem Malloy, FCI and Dawson.* By letter dated May 20, 1988, the petitions for reconsideration of the July 17, 1987 action of Chief, FM Branch returning these applications were reinstated *nunc pro tunc* and accepted for filing. The applications previously had been returned as unacceptable for filing after preliminary study revealed that the proposed facilities would be short-spaced by 0.9 kilometers to the Kinston, North Carolina allocation of Channel 275A, in violation of 47 C.F.R. § 73.207. The short-spacing arises because the Kinston, North Carolina allotment is subject to a site restriction of 8.3 kilometers (5.1 miles) west. *See Fourth Report and Order* in MM Docket No. 84-231, FCC 86-210, Mimeo Mo. 36654, released May 9, 1986.

8. Subsequently, it came to the staff's attention that the referenced coordinates respecting the 8.3 kilometer site restriction were neither listed in the *Fourth Report and Order, supra*, nor were published in accordance with 47 C.F.R. § 0.445(e). Consequently, the above applicants were not afforded constructive notice of the referenced coordinates and could not have observed the site restriction in preparing their applications. *See , e. g., M & C Broadcasting, Inc. v. FCC*, FCC 85-217, released April 29, 1985. In order to remedy the 0.9 kilometers short-spacing to the Kinston, North Carolina allotment, Rem Malloy and FCI will be required to submit site change amendments to eliminate conflict with the referenced coordinates of the Kinston allocation (*i. e.*, 35' 17' 02" North Latitude, 77' 40' 02" West Longitude) to the presiding Administrative Law Judge within 30 days of the release of this Order. [3]

9. *Peebles.* In its application, Peebles reports that its principal, Millard R. Peebles, Jr., is employed by TVX of Raleigh, North Carolina, licensee of WLFL-TV, Raleigh, North Carolina, as a Master Control Operator. The above principal states that he will terminate his employment at WLFL-TV should the Peebles application be granted. Accordingly, an appropriate condition will be specified below.

10. *BCB, Dawson.* The applicants above have given negative responses to Section III, Items 1 and 2, FCC Form 301, pertaining to financial certification. Consequently, an issue as to the applicants' financial qualifications will be specified below.

11. *Clear Channel.* On May 15, 1987, Clear Channel filed an application for a new FM station on Channel 298A to serve Columbus, Ohio (File No. BPH-870515NN). The Columbus allotment was randomly selected for financial audit of all applications filed by those applicants pursuant to the Commission's Public Notice, FCC 87-97, 52 Fed. Reg. 17,333 (May 7, 1987). Should any adverse determination be made by the staff concerning Clear Channel's financial qualifications to construct the facility proposed in the Raleigh proceeding, appro-

priate issues would be sought in this proceeding by the Bureau's Hearing Branch staff. Thus, because no final determination has yet been made on Clear Channel's financial qualifications, it may proceed with its instant application pending the outcome of the Columbus financial audit.

12. In response to Section VI, FCC Form 301, the applicant below has indicated that it will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. The EEO programs submitted by the following applicant is incomplete or is otherwise deficient in the manner described below. Accordingly, the applicant listed below will be required to file an amended EEO Program with the presiding Administrative Law Judge within 30 days of the release of this Order.

APPLICANTS	DEFICIENCIES
BCB	Failed to identify specific sources of recruitment specializing in women and minority candidates.

13. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Peebles	October 26, 1987
Raleigh FM	February 10, 1988
Free Air	September 4, 1987
Clear Channel	May 6, 1987; June 9, 1987; July 23, 1987; August 21, 1987; October 6, 1987; November 17, 1987; December 9, 1987; March 2, 1988
FCI	January 27, 1987; May 27, 1987

14. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

15. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

16. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to the following applicants, whether the applicants are financially qualified: BCB, Dawson.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

17. IT IS FURTHER ORDERED, That for the reasons set forth in paragraphs 2-3 hereinabove, the petition for reconsideration filed by Cofield IS DENIED.

18. IT IS FURTHER ORDERED, That for the reasons set forth in paragraphs 4-6 hereinabove, the petitions for reconsideration filed by LPNC, Special Markets, FRLP and Willowbrook ARE DENIED.

19. IT IS FURTHER ORDERED, That in accordance with paragraphs 7-8 hereinabove, Rem Malloy and FCI shall submit amendments to the presiding Administrative Law Judge within 30 days of the release of this Order.

20. IT IS FURTHER ORDERED, That in the event of a grant of Peebles' application, the construction permit shall be conditioned as follows:

Prior to the commencement of program test authorization, permittee shall certify to the Commission that Millard R. Peebles, Jr., has terminated his position with TVX of Raleigh- Durham, Inc., licensee of WLFL-TV, Raleigh, North Carolina.

21. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant shall submit Section VI information in accordance with the requirement of 47 C.F.R. § 73.2080(c) to the presiding Administrative Law Judge: BCB.

22. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Peebles, RFLP, Free Air, Clear Channel, FCI.

23. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

24. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later then **August 9, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

25. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] By letter dated May 27, 1988, the joint settlement agreement between Christian FM Application Partnership (BPH-860707NB) and Holy Spirit FM Limited Partnership (BPH-860707NX) was approved, and the application of Christian FM Application Partnership was dismissed.

[2] On June 30, 1987, Fleming Broadcasting timely filed a petition for reconsideration requesting reconsideration of the May 29, 1987 action of the Chief, Audio Services Division, returning its application (BPH-860703MG) as violative of the alien ownership provisions of 47 U.S.C. § 310(b). The instant petition was consolidated with those filed by Prime Media Broadcasting, Inc. concerning applications for new FM service in Fargo, North Dakota; Great Falls, Montana; and Orlando, Florida, which are now pending before the Commission.

[3] Dawson tendered an amendment specifying a site fully spaced to the Kinston allotment on August 24, 1987. That amendment was accepted for filing by staff letter dated May 20, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-327

In re Applications of

HECTOR NICOLAU	File No. BPCT-871208KE
EAST COAST TELECASTERS CO., L.P.	File No. BPCT-880209KF
DAMARYS DE JESUS	File No. BPCT-880209KH

For Construction Permit
Fajardo, Puerto Rico

HEARING DESIGNATION ORDER)

Adopted: June 15, 1988; Released: July 20, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications for a new commercial television station to operate on Channel 34, Fajardo, Puerto Rico.

2. No determination has been reached that the tower height and location proposed by each applicant would not constitute a hazard to air navigation. Accordingly, an appropriate issue will be specified.

3. The coverage areas proposed by the applicants differ significantly. Consequently, the areas and populations which would be within each predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by each of the applicants would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

6. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

7. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-309

In re Applications of

MONROE - LIVINGSTON RADIO ASSOCIATES (hereafter: MLRA)	File No. BPH-870817MI
SIMA BIRACH (hereafter: Birach)	File No. BPH-870818MA
MARY ANN HURLBURT, ET AL. D/B/A HFH COMMUNICATIONS ASSOCIATES (hereafter: HFH)	File No. BPH-870819NG

For a Construction Permit for a
New FM Station on Channel 397A in
Honeoye Falls, New York

HEARING DESIGNATION ORDER

Adopted: June 15, 1988 **Released: July 20, 1988**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Late - Filed Amendment.* The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT
Birach	June 1, 1988

3. *Areas and Populations.* Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, that the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein. *APPLICANT* : Birach

7. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **August 10, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-334

In re Applications of

KARL H. STOLL	File No. BPCT-871112KF
COASTAL PLAIN TELEVISION, INC.	File No. BPCT-880114KJ
COMMUNITY SERVICE TELECASTERS, INC. (WGTJ(TV))	File No. BMPCT-880114KM

For Construction Permit
Greenville, North Carolina

HEARING DESIGNATION ORDER

Adopted: June 20, 1988 **Released: July 20, 1988**

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned applications for authority to construct a new[1] commercial television station on Channel 14, Greenville, North Carolina.

2. Due to the adjacency of Channel 14 to frequencies used by land mobile radio services, a Channel 14 permittee that inadequately suppresses its secondary emissions could cause interference to land mobile radio services. *See* , Section 73.687(i)(1) of the Commission's Rules. Accordingly, the grant of a construction permit to any of the applicants will be conditioned to require the permittee to take adequate measures, prior to program test authority, to prevent interference to land mobile radio stations in the 460-470 MHz band.[2]

3. No determination has been reached that the tower heights and locations proposed by Karl H. Stoll and Coastal Plain Television, Inc. would not constitute a hazard to air navigation. Accordingly, an appropriate issue will be specified.

4. The technical data submitted by the applicants indicate that there would be a significant difference in the size of the area and population which would be served by each. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respectto Karl H. Stoll and Coastal Plain Television, Inc., whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

7. IT IS FURTHER ORDERED, That, in the event of a grant of any of the applications, the construction permit shall contain the following condition:

During equipment tests, authorized by Section 73.1610 of the Commission's Rules, the permittee shall take adequate measures to identify and substantially eliminate objectionable interference which may be caused to existing land mobile radio facilities in the 460-470 MHz band. Documentation that objectionable interference will not be caused to existing land mobile radio facilities shall be submitted along with the request for Program Test Authority. Program tests shall not be commenced under Section 73.1620(a) of the Commission's Rules and may only be started after specific authority is granted by the Commission. An application for a license must be filed within 10 days after the start of program tests.

8. IT IS FURTHER ORDERED, That The Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

9. IT IS FURTHER ORDERED, That each of the applicants shall file a response to the Commission's letter of April 22, 1988, requesting information regarding potential land mobile interference, with the presiding Administrative Law Judge within thirty (30) days from the release date of this Order.

10. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

Each applicant shall attach to its notice of appearance a remittance of6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart,
Chief, Video Services Division
Mass Media Bureau

FOOTNOTES

[1] Community Service Telecasters, Inc. permittee of Station WGTJ(TV), Greenville, North Carolina, proposes to change its frequency from Channel 38 to Channel 14.

[2] On April 22, 1988, each applicant was requested, by letter, to submit a showing as to possible land mobile interference. As of this date, we have not received a response from any of the applicants. Each of the applicants will be required to filed a response within 30 days from the release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ADVANCED TELECOMMUNICATIONS CORPORATION and its shareholders
Transferors

and

MICROTEL, INC. and its shareholders
Transferees

File No. I-T-C-88-123(TC)

Application for Transfer of Control

MEMORANDUM, ORDER AND AUTHORIZATION

Adopted: June 28, 1988 **Released: July 20, 1988**

By the Chief, International Facilities Division:

1. On April 29, 1988, Advanced Telecommunications Corporation (ATC) filed an application, pursuant to Section 214 of the Communications Act of 1934, as amended, for consent to transfer of control of its authorization, to resell international message telephone services (IMTS). The proposed transfer of control would be accomplished through the merger of a subsidiary of ATC and Microtel, Inc. (Microtel), pursuant to the law of the State of Florida. Upon consummation of the merger, Microtel's current shareholders will assume majority control of ATC. The application was placed on public notice on May 11, 1988. No comments were received.

2. ATC is a Delaware corporation and with its wholly-owned subsidiaries Transcall America, Inc., Directline of Austin, Inc., and Satelco, Inc., operates as a domestic reseller providing IMTS service in the States of Florida, Georgia, Alabama, Tennessee, Louisiana, Arkansas, Texas, Oklahoma, Missouri, and Kansas. ATC is also authorized to provide resale of IMTS services.[1]

3. Microtel is a Florida corporation and provides interexchange telecommunications services utilizing its own fiber optic transmission network in Florida and Georgia, as a non-dominant common carrier. Microtel is also authorized to provide resale of IMTS services.[2]

4. The proposed transaction contemplates that ATC and Microtel will enter into an agreement whereby a newly owned subsidiary of ATC will pursuant to Florida Law be merged with and into Microtel, with Microtel surviving as a subsidiary. Upon consummation of the merger, preferred and common shares held by Microtel shareholders will be converted into preferred and common shares of ATC stock. As a consequence of the exchange of shares, Centel Network Company, Alltel Corporation, and Norfolk Southern Corporation, together with other Microtel shareholders will hold 52% of the common stock of ATC on a fully diluted basis. In addition, as further consideration for the exchange of stock, the Microtel shareholders will designate a majority of the ATC directors, and the current president and chief executive officer of Microtel will become the president and chief executive officer of ATC.

5. While it appears that the president of ATC and some of its directors will be replaced, we noted that the replacement as president possesses experience in the common carrier area, particularly in providing resale of IMTS. Moreover, the transfer of control of the IMTS operations of ATC will permit the merged ATC and Microtel to compete more effectively in the IMTS market. Grant of the proposed transfer will enable the companies to realize certain administrative economies of scale from the proposed transfer which will lower their combined operating and managerial costs. As a result, the companies will be able to offer better service to their companies at competitive rates. Also the aggregation of capital resources as a result of the merger will enhance the companies' potential for growth.

6. In view of the foregoing, we find that the public convenience and necessity will be served by approving ATC's application for consent to merge into and with Microtel.

7. Accordingly, IT IS ORDERED, that application File No. I-T-C-88-123-(TC) for consent to transfer of control of Advanced Telecommunications Corporation to the shareholders of Microtel, Inc., particularly, Centel Network Company, Alltel Corporation and Norfolk Southern Corporation IS GRANTED.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Advanced Telecommunications Corporation, (File No. I-T-C-86-099) Mimeo No. 6047 (released July 30, 1986).

[2] Microtel Inc., (File No. I-T-C-86-075) Mimeo No. 4445 (released May 13, 1986).

ized billing, and traffic management studies, that do not change the fundamental nature of the underlying basic service but instead facilitate its use.[14]

6. In the *BOC Separation Order*,[15] we decided that the BOCs should be permitted to offer enhanced services only through corporate entities that are structurally separated from their subsidiaries providing common carrier communication services. We required, as elements of that separation, that each BOC maintain separate officers, operating and marketing personnel, computer facilities, and books of account for its enhanced services operations.[16] We recognized, however, it might be appropriate to waive those requirements to avoid depriving the public of the benefits of advanced technology at reasonable prices.[17]

B. ***The NATA/Centrex Order***

7. This proceeding began when NATA petitioned for a declaratory ruling that certain Centrex features and residential telephone services should be classified as enhanced services. Those Centrex features included CDAR, the Centrex customer change feature (CCCF), automatic route selection-deluxe (ARS-D), facility restriction levels, deluxe queuing, facilities administration and control, traffic management data (pollable), automatic overflow to DDD, forwarded call information, and station message detail recording (SMDR). The term Centrex is used to describe a telephone company service that switches calls among a customer's internal telephone stations (intercom calls) as well as calls between the customer's stations and the rest of the world. Such switching is usually performed at the central office of the local exchange company. NATA also asked us to determine the status of several residential services including call monitor, call trace, preferred call forwarding, call block, call selector, call return, repeat dialing, and call tracking. Those services are offered to non-Centrex customers as local area signalling service (LASS) features. They are based on the provision of the calling party's telephone number and can be provided when common channel interoffice signalling circuits transmit the calling party's telephone number and other signalling information to the receiving central office.[18]

8. In the *NATA/Centrex Order*, we traced the evolution of our regulatory treatment of computer processing applications offered over common carrier facilities from the onset of *Computer I* through the *Computer II Reconsideration Order*. We determined, on the basis of that administrative history, and in particular on the basis of paragraph 98 of the *Computer II Final Decision*,[19] that we had intended the definition of enhanced services set forth in Section 64.702(a) "to limit the scope of tariffed basic service to the provision of a pure transmission capacity" while allowing "carriers to use the processing and storage capabilities within their networks to offer optional tariffed features which facilitate use of traditional telephone service."[20] Accordingly, we held that the enhanced service definition does not encompass "adjunct[s] to basic service" which facilitate the provision of basic services without altering their fundamental character.[21] Such "adjunct services" were instead to be treated as basic services even if they fell within possible literal readings of the definition of enhanced services.[22]

9. We analyzed the functional characteristics of each of the features and services which NATA had asked us to address. That analysis led us to conclude that, with the exception of CDAR, all of those features and services should be classified as basic services because they facilitate the provision of basic services without altering their fundamental character. We found that, with the exception of CDAR, those features and services did not provide subscribers with "additional, different or restructured information" within the meaning of clause 2 or "involve subscriber interaction with stored information" within the meaning of clause 3 of the definition of enhanced service.[23] We determined that CDAR is an enhanced service, because it allows Centrex customers to use the telephone companies' electronic switches for the storage and retrieval of customer business information which is not used in the provision or management of the customers' telephone service.[24] That finding placed CDAR squarely within the definition of enhanced services.

C. ***The CDAR Waiver Order***

10. Prior to the release of the *NATA / Centrex Order*, the BOCs had been offering CDAR as a tariffed service, integrated with other Centrex features which that *Order* declared to be basic services. After the release of that *Order*, the BOCs petitioned for waivers of Section 64.702 so they could continue to provide CDAR under tariff and on structurally unseparated bases. In the *CDAR Waiver Order*, the Bureau granted those waiver requests pending action on the subject petitions for reconsideration and the reexamination in *Computer III* of the overall requirements for the BOCs' enhanced services operations.[25] The Bureau found that the BOCs had shown that they could not provide CDAR efficiently without integrating it with other Centrex features, that the BOCs would have no incentive to offer CDAR through separate corporate entities and would probably not do so, and that the costs of providing CDAR through separate corporate entities clearly outweighed whatever benefits might be derived from strict adherence to our structural separation requirements for CDAR.[26] The Bureau required, however, that the BOCs provide CDAR only as a separate offering, unbundled from basic Centrex features.[27]

D. ***The Computer III Framework***

11. In the *Computer III Phase I NPRM*, we undertook a comprehensive reexamination of our regulatory treatment of data processing and communications services, and suggested the possible replacement of our definitions of basic and enhanced services with a fundamentally new regulatory approach founded on an economic analysis of specific offerings and, in particular, on whether the services were subject to effective competition.[28] Assuming continued use of our *Computer II* definitional approach, we proposed to amend Section 64.702(a) to make clear, *inter alia*, that adjunct services such as "communications between a subscriber and the network itself for call setup, call routing, call cessation, calling or called party identification, billing, and accounting" are basic rather than enhanced services.[29] The proposed amendment would have expressly confirmed our prior interpretations of the definition of enhanced service, including those made in the *NATA / Centrex Order*.[30]

12. In the *Computer III Phase I Order*, this Commission decided to continue using the *Computer II* definitional approach.[31] In the *Computer III Phase II Order*,[32] we decided not to amend the definition of enhanced services to exclude adjunct services expressly, concluding that any revision in the language of that definition would introduce additional ambiguity into a rule whose meaning had be-

come well-established through prior interpretation. To avoid disputes regarding the status of those prior interpretations, we reaffirmed that the definition "appl[ies] only to end-to-end communications between or among subscribers, and not to communications between a subscriber and the network itself for call setup, call routing, call cessation, calling or called party identification, billing, and accounting."[33]

III. NATA' S PETITION

A. *The Parties' Positions*

1. *NATA's Arguments*

13. In its petition for reconsideration, NATA contends that we disregarded and distorted the "plain meaning" of Section 64.702(a) when we decided that adjunct services are not enhanced services within the meaning of that rule. NATA states that many of the Centrex features and residential telephone services we determined to be basic fall squarely within that rule's definition of enhanced service. NATA asserts that traffic data to customer (pollable), forwarded call information, advanced station message detail recording, and the residential telephone services we addressed indisputably "employ computer processing applications" to "provide subscribers with additional, different, or restructured information" within the meaning of clause 2 of that definition. NATA also asserts that automatic routing selection and customer change feature offerings clearly "involve subscriber interaction with stored information" within the meaning of clause 3 of that definition. NATA maintains that we must give effect to Section 64.702(a) as we wrote it, not as we may have intended to write it.

14. Alternatively, NATA argues that even if an exception for adjunct services is to be engrafted retroactively into the definition of enhanced service, the features at issue in this proceeding should not fall within that exception. NATA maintains that those features are network substitutes for features offered in the competitive arena as enhanced services or as part of advanced customer premises equipment (CPE). In NATA's view, if those features are adjuncts to anything, they are adjuncts to enhanced services and CPE.

15. NATA argues further that, if there is to be an adjunct services category, we must restrict it to services peculiarly suited to the provision of traditional telephone service to avoid frustrating the fundamental purpose behind *Computer II*. According to NATA, that purpose was to distinguish features which are appropriately incorporated into a franchised monopoly's bottleneck service offerings from features which can and must be provided on a competitive basis.

2. *Comments on NATA's Petition*

16. Ameritech, AT&T, Bell Atlantic, Pacific Bell, U S West, and NYNEX all oppose NATA's petition for reconsideration. Those parties contend that we acted properly and within the scope of our authority in concluding that adjunct services are not enhanced services within the meaning of Section 64.702(a). They argue that we must consider the circumstances under which that rule was adopted as well as the purposes behind the rule in determining its meaning. Indeed, their position appears to be that it would have been an abuse of discretion for us to ignore those circumstances and purposes in applying the rule.

17. Those parties also dispute the "plain meaning" NATA ascribes to Section 64.702(a). They maintain that NATA would have this Commission classify as enhanced any service which non-network equipment or CPE can perform. They contend that any such interpretation of Section 64.702(a) would result in virtually all computer processing applications performed within the telephone network being classified as enhanced and would contradict the rule's language. They maintain that treating Centrex features as adjuncts to, or facilitators of, traditional telephone service is consistent with the dichotomy between basic and enhanced services set forth in the *Computer II Final Decision* and codified in Section 64.702(a). They claim that we have repeatedly expressed our clear intent to treat adjunct services as basic services.

18. The parties opposing NATA's petition for reconsideration state that we did not abuse our discretion in refusing to classify as enhanced any service which is commonly provided on a competitive basis. According to those parties, CPE can perform virtually any switching or Centrex function that the network can perform. Therefore, they contend, the acceptance of NATA's position would stifle technological development of the basic network, would restrict consumer choices, and would ultimately prove to be anti-competitive.

3. *Reply Comments*

19. In reply, NATA states that it is not arguing that all Centrex switching functions, or all Centrex features that compete with CPE, should be classified as enhanced services. Instead, NATA states that its position is that the Centrex features at issue in this proceeding fall within the definition of enhanced service and therefore must be classified as enhanced services. In NATA's view, it is inconsistent with both the "plain meaning" and the fundamental purpose of the *Computer II* rules to engraft an exception for adjunct services into the definition of enhanced services and thereby exempt enhanced offerings, which are competitively available outside the network in commonly provided enhanced services or CPE, from the operation of those rules. NATA maintains that such an exemption increases the likelihood of cross-subsidization and anti-competitive conduct in the CPE and enhanced services markets without furthering our goals of providing regulatory certainty and fostering the development of competition in those markets.

20. NATA contends, in addition, that the only legitimate inference to be drawn from the administrative history behind Section 64.702 is that we did not intend to exempt adjunct services from our definition of enhanced services. NATA reminds us that the *Computer II Tentative Decision*[34] proposed a regulatory framework which would have distinguished (a) regulated "communications" services from unregulated "data processing" services, and (b) "voice" and "basic non-voice" services from "enhanced non-voice" services. In NATA's view, paragraph 98 of the *Computer II Final Decision* was concerned with the differences between communications and data processing services rather than the differences between basic and enhanced services. NATA argues that paragraph 98, therefore, does not support our conclusion that adjunct services should be classified as basic services. NATA also reminds us that the *Computer II Tentative Decision* proposed a rule

which would have allowed carriers to offer enhanced computer functions under tariff, if they were "directly relate[d] to and . . . for the purpose of providing a communications service, or for meeting the carrier's own internal operational and financial management needs."[35] NATA states that we did not adopt that proposed rule when we removed enhanced services from regulation in the *Final Decision*. In NATA's view, the failure to adopt that proposed rule indicates that we intended adjunct services to be classified as enhanced services.

B. *Discussion*

1. *The* "Plain *Meaning" of Section 64.702(a)*

21. NATA contends that the Centrex features and residential telephone services classified as basic services in the *NATA/Centrex Order* are actually enhanced services within the meaning of Section 64.702 of our Rules. NATA bases that position principally on what it describes as the "plain meaning" of the definition of enhanced service in Section 64.702(a), and NATA argues that we should not have examined the administrative history behind that definition in considering the regulatory status of those Centrex features and residential telephone services. We do not agree.

22. We believe that the area our definition addresses, computer processing applications, is a peculiarly unsuitable one for the application of the "plain meaning" doctrine or any other rule of construction which might limit our use of the history underlying our rule. That area is an extremely complex one. Substantial portions of our efforts in the *Computer II* proceeding were devoted to the consideration of alternative frameworks for distinguishing computer processing from common carrier communication services. After the consideration of numerous alternative frameworks, we adopted a framework that is triggered by the definition of enhanced service that is the focus of this proceeding. Our experiences in applying that definition and in considering whether it should be amended have made us abundantly aware that no definition of enhanced service can address all possible situations without producing unintended results.[36]

23. We recognize that there may be features and services for which the words of our definition make our intent so clear as to permit the definition's application without reference to its administrative history. To persuade us that particular features and services present such a situation, however, any party would have to show that the language of the definition clearly encompasses the services and features at issue and that the application of the "plain meaning" doctrine would not lead to absurd results. NATA has not made the requisite showings.

24. As indicated previously, the *NATA/Centrex Order* analyzed the functional characteristics of each of the features and services at issue in this proceeding. On the basis of that analysis, we found that, with the exception of CDAR, each of these features and services facilitate the provision of basic services without altering their fundamental character.[37] While NATA asserts that these features and services "have little, if anything, to do with "traditional telephone service,"[38] NATA has not attempted to show how our analysis of their functional characteristics might be incorrect. We remain convinced that our analysis is correct; and we confirm that, with the exception of CDAR, the features and services at issue have the same fundamental character as basic services.

25. We believe that a finding that particular features and services have the same fundamental character as *basic* services inherently precludes classification of those services as *enhanced* services; and we do not see how any definition of *enhanced* services could have a "plain meaning," if it were to apply to services having the same fundamental character as *basic* services. Even if such a definition were possible, our definition is not such a definition.

26. In addition, we conclude that the language of clauses 2 and 3 of the enhanced services definition cannot be construed to encompass features and services having the same fundamental character as basic services without producing absurd results.[39] Clause 2 distinguishes between enhanced and non-enhanced services on the basis of the type of information provided the subscriber.[40] The three adjectives used to make that distinction ("additional," "different," and "restructured") all imply that a service should be classified as an enhanced service if and only if it provides the subscriber with information that is materially distinct from the information the subscriber otherwise would receive. Nothing in this clause, or in the remainder of Section 64.702(a), suggests that services having the same fundamental character as basic services should be classified as enhanced.

27. Similarly, clause 3 distinguishes between enhanced and non-enhanced services on the basis of the subscriber's actions in relation to the service.[41] While, as NATA suggests, it is possible to interpret this clause so that it encompasses many services which do not alter the fundamental character of basic services, it is also possible to conclude that virtually every subscriber use of common carrier transmission facilities that employs computer processing applications involves subscriber interaction with stored information under certain literal readings of Section 64.702(a). For example, in a simple toll call, the calling party generates electrical impulses which provide the carrier with information its computers may use, together with other previously stored information, for billing and collection purposes. That augmentation of previously stored information by a subscriber would constitute "subscriber interaction with stored information" under some literal readings of Section 64.702(a). It would be absurd for us to hold that enhanced services are so prevalent without determining whether the administrative history behind our definition would support such a holding, and we will not do so. Therefore, we affirm our decision to consider the administrative history behind our definition in evaluating the features and services at issue in this proceeding.

2. *The Administrative History behind Section 64.702(a)*

28. In the *NATA/Centrex Order*, we traced the evolution of our treatment of computer processing applications from the onset of *Computer I* through the *Computer II Reconsideration Order*.[42] We determined on the basis of that administrative history, and in particular on the basis of paragraph 98 of the *Computer II Final Decision*, that, with the exception of CDAR, the services and features at issue are adjunct services that should not be classified as enhanced services. NATA disputes our reading of paragraph 98 and contends that other portions of the administrative history indicate that adjunct services should be classified as enhanced services.

29. The definitional framework we proposed in the *Computer II Tentative Decision* would have distinguished between "communications" and "data processing," and among "voice," "basic non-voice," and "enhanced non-

voice" services.[43] The *Computer II Tentative Decision* proposed to let carriers provide both "voice" and "basic non-voice" services on structurally unseparated bases. We recognized that carriers would employ data processing in providing such services; and we explained, in footnote 60 to the *Tentative Decision*, that we would not foreclose "enhanced processing applications" from being performed in conjunction with "voice" and "basic non-voice" services. In that same footnote, we listed call forwarding, speed calling, itemized billing, traffic management studies, and voice encryption as examples of "enhanced processing applications" that carriers could perform in conjunction with "voice" services.[44] Carriers were to be able to provide these "enhanced processing applications" under tariff because they would "directly relate to and be for the purpose of providing a communication service, or for meeting the carrier's own internal operational and financial management needs."[45]

30. We did not adopt the regulatory framework proposed in the *Tentative Decision*, with its distinctions between "communications" and "data processing," and among "voice," "basic non-voice," and "enhanced non-voice" services. In lieu of that complicated and unnecessarily confusing framework, we adopted the two-category framework embodied in Section 64.702(a), with its single distinction between basic and enhanced services.[46] When we abandoned the distinction between "voice" and "non-voice" services, we addressed the regulatory treatment to be accorded the "enhanced processing applications" which the *Tentative Decision* framework would have allowed carriers to offer under tariff in conjunction with "voice" services. After noting that the "voice" category could have distinguished traditional telephone service from other basic and various enhanced services, we stated in paragraph 98 of the *Final Decision* :

> At footnote 60 of the *Tentative Decision*, we stated that we are not foreclosing enhanced processing applications from being performed in conjunction with 'voice' service. We indicated that "computer processing applications such as call forwarding, speed calling, directory assistance, itemized billing, traffic management studies, voice encryption, etc., may be used in conjunction with 'voice' service." The intent was to recognize that while POTS [plain old telephone service] is a basic service, there are ancillary services directly related to its provision that do not raise questions about the fundamental communications or data processing nature of a given service. Accordingly, we are not here foreclosing telephone companies from providing to consumers optional services to facilitate their use of traditional telephone service. Any option that changes the nature of such telephone service is subject to the basic/enhanced dichotomy and their respective regulatory schemes. For example, voice storage and automatic call answering within the network would be enhanced services. Thus any tariffed optional services must not change the nature of traditional telephone service.*
>
> * As a practical matter this only affects those carriers subject to the resale structure for the provision of enhanced services since carriers not so subject may offer any enhanced service as a nontariffed option.[47]

31. NATA views this administrative history as highly ambiguous and insufficient to support any implied exemption from our definition of enhanced services. We disagree. Although the history reflects the complexity of the subject matter being addressed, it expresses this Commission's intent to treat adjunct services as basic services. Paragraph 98 states, quite directly, that optional services provided by telephone companies would be subject to the basic/enhanced dichotomy when they change the nature of traditional telephone service. That statement would have made no sense if services that do not change the nature of traditional telephone service were to be treated as enhanced services. In addition, paragraph 98 indicates that "enhanced processing applications" listed in footnote 60 of the *Tentative Decision* should be viewed as services which do not change the nature of traditional telephone service. Under the *Tentative Decision*, those services would have been "voice" services, and telephone companies would have been able to provide them under tariff as services directly related to the provision of basic service. If, as NATA suggests, we had intended in the *Final Decision* to preclude telephone companies from providing these services under tariff, we would have made that intent explicit. Instead, we stated in paragraph 98 that these services are directly related to the provision of telephone services. Because of that direct relationship, we found that these services are fundamentally communications, rather than data processing, services. A central premise of the *Computer II* framework was that services that are fundamentally communications services should be classified as basic services and remain subject to tariffing, while services that are fundamentally data processing services should be classified as enhanced services and should be preemptively deregulated. Classifying adjunct services as enhanced services would be utterly inconsistent with that framework.

32. In any event, the computer processing applications employed in the Centrex features and residential telephone services classified as basic services in the *NATA/Centrex Order*, like other adjunct services, are all the result of communications between subscribers and the network for call setup, call routing, call cessation, calling or called party identification, billing, or accounting. In the *Computer III Phase II Order*, we resolved any ambiguity there may have been in the administrative history with respect to the application of our definition of enhanced services to such computer processing applications when we confirmed that they should not be classified as enhanced services.[48] Accordingly, we conclude that the consistent administrative history behind the definition unambiguously supports our conclusion that these adjunct services should be classified as basic services.

3. *The Purposes behind Section 64.702(a)*

33. NATA argues further that we should restrict the adjunct services category to services which are peculiarly suited to the provision of traditional telephone service to avoid frustrating the fundamental purposes behind *Computer II*. We agree that those purposes include providing greater regulatory certainty, creating an environment conducive to the provision of CPE and enhanced services on a competitive basis, and removing unnecessary and artificial restrictions on the provision of services that use computer technology.[49] Our decision to classify certain Centrex features and residential telephone services as basic services is consistent with these purposes.

34. How best to achieve the fundamental purposes cited by NATA has often been the subject of Commission consideration. In *Computer III*, for instance, this Commission considered abandoning the basic/enhanced services definitional approach established in *Computer II* in favor of a framework more directly linked with an economic analysis of various service offerings. We decided instead to retain the definitional framework at issue here. Although we have long recognized that no definitional approach could ever distinguish basic services from enhanced services with absolute precision,[50] we believe that the line we have drawn between those categories of service imparts as much regulatory certainty as is consistent with our statutory responsibilities. If we were to classify these adjunct services as enhanced services, we would have to develop new criteria to distinguish basic services from services that are fundamentally the same as basic services. We do not see how those criteria could result in more regulatory certainty than our current approach of treating these adjunct services as basic services. More significantly, we believe that our approach provides a regulatory framework which promotes competition without unnecessarily or artificially restricting the use of computer technology. Classifying these adjunct services as enhanced services, as NATA has proposed, would place unwarranted limitations on the steps telephone companies could take to improve basic services, to the detriment of consumers. Therefore, we will affirm the *NATA/Centrex Order* to the extent it classifies certain Centrex features and residential telephone services as basic services.

IV. BELL ATLANTIC'S AND BELLSOUTH'S PETITIONS

A. *The Parties' Positions*

1. *Bell Atlantic's and BellSouth's Arguments*

35. In their petitions for reconsideration, Bell Atlantic and BellSouth challenge our determination that CDAR is an enhanced service. That Centrex feature is provided in connection with special message detail recording (SMDR), another Centrex feature which we determined to be a basic service. The SMDR customer receives a record (on paper, on computer tape, or through on-line transmission) of the date, time, duration, and called number of each of its outgoing calls. CDAR permits the customer to add numbers of his or her own choosing to the SMDR record. The customer does so by dialing the numbers to be associated with a call before dialing the call.

36. Bell Atlantic argues that CDAR must be classified as a basic service because it assertedly does not itself employ "computer processing applications" within the meaning of Section 64.702(a). Instead, Bell Atlantic claims, CDAR simply permits SMDR subscribers to "tag" SMDR information with one or more digits. Bell Atlantic states that the SMDR record provided the customer includes those digits, unchanged and unprocessed, as the customer recorded them.

37. Both Bell Atlantic and BellSouth contend that CDAR should be classified as a basic service because it facilitates the provision of basic telephone service. They state that CDAR is simply an automated version of a manual service introduced for private branch exchange (PBX) customers during 1959. They also state that in the manual service, the telephone company assigned multiple special billing numbers to its customers, who, in turn, could assign the numbers to particular accounts. They state that while CDAR customers select their own billing numbers, both services merely provide customers with information that "is fundamentally and exclusively usage information--in categories chosen by the customer."[51] They maintain that subscribers use the information to determine matters such as the source or destination of a call, the volume and distribution of calls placed by particular individuals or departments, and the accounts to which particular calls should be billed.

2. *Comments on Bell Atlantic's and BellSouth's Petitions*

38. In its opposition to Bell Atlantic's and BellSouth's petitions, NATA argues that CDAR involves computer processing applications within the meaning of Section 64.702(a). NATA states that Bell Atlantic's assertion to the contrary is both incorrect and inconsistent with the representations of other telephone companies in this proceeding. NATA claims that "computer processing applications" clearly occur when, as is the case with CDAR, central office computers use numerical account codes to generate reports containing information regarding the identity, purpose, and subject matter of the subscriber's telephone calls.

39. NATA argues that CDAR's status as an automated version of a manual service introduced during 1959 provides no basis for classifying it as a basic service, because the vintage of a service assertedly should be irrelevant in determining whether it is an enhanced service. NATA maintains that even if we were to continue to classify adjunct services as basic services, we should not classify CDAR as an adjunct service. NATA states that message storage and retrieval services are unquestionably enhanced services. In NATA's view, customer business information storage and retrieval services which, like CDAR, use central office computers, are no more part of basic service than are message storage and retrieval services.

3. *Reply Comments*

40. In its reply, Bell Atlantic argues that NATA's opposition confirms that CDAR does not involve computer processing applications. Bell Atlantic states CDAR simply permits the customer to tag the SMDR record with numbers and that the call detail tape sent to the customer each month includes those numbers, unchanged and unprocessed. While Bell Atlantic admits that "the CDAR recording function is performed by a computer,"[52] Bell Atlantic argues that the introduction of a computer into a service does not make the service enhanced.

41. BellSouth and Ameritech also contend that NATA's reading of the definition of enhanced service is too expansive. BellSouth argues that CDAR simply gives customers an additional way to classify calls recorded on the SMDR call detail and that NATA has failed to explain why a feature that merely adds a level of usage classification capability should be classified as an enhanced service. Ameritech maintains that any feature whose nature and purpose arguably facilitate the management of a customer's telephone service should be considered basic, regardless of how the customer may use the service.

B. *Discussion*

1. *CDAR's Status as an Enhanced Service*

42. CDAR is offered over common carrier transmission facilities used in interstate commerce. Therefore, to persuade us that CDAR is not an enhanced service, Bell Atlantic, BellSouth, and Ameritech would have to show either that it does not employ computer processing applications or that the computer processing applications it does employ do not fall within any of the three clauses in our definition of enhanced service.[53] Of the parties to this proceeding, only Bell Atlantic claims that CDAR does not employ computer processing applications. We find Bell Atlantic's argument unconvincing, and instead agree with BellSouth's position that CDAR, like "virtually every switched basic telecommunications service, as well as most services adjunct to basic service," involves computer processing.[54] To use CDAR, a subscriber dials a series of numbers before dialing the numbers otherwise dialed to make the call. Some or all of the extra numbers, generally two digits, represent the code the subscriber wants to have associated with the call. The subscriber's act of dialing generates electrical impulses. The telephone company uses computers to route these impulses to a central office, to record on magnetic tape or other medium the information the impulses represent, and to retrieve the information for subsequent transmittal to the subscriber. Each of these uses of a computer is a computer processing application.

43. The computer processing applications the telephone companies perform in connection with CDAR allow their Centrex customers to store and retrieve customer business information that the telephone companies do not use in the provision and management of the customers' telephone service. This storage and retrieval function constitutes the provision of "different, additional, or restructured information" within the scope of clause 2 of our definition of enhanced service. The information CDAR provides the subscriber is both quantitatively and qualitatively distinct from the information the subscriber otherwise would receive.[55]

44. The BOCs argue, however, that CDAR is an adjunct service and, as such, lies outside the scope of our definition of enhanced service. They state that certain PBX customers received a manual form of CDAR from their local exchange carriers as long ago as 1959, and that CDAR provides subscribers with information that is fundamentally and exclusively usage information, in categories the subscriber has picked. Bell Atlantic and BellSouth claim that these aspects of CDAR establish that it facilitates the provision of basic services without altering their fundamental character.

45. We cannot agree that CDAR is an adjunct service. The BOCs have traditionally provided a number of services, such as *Yellow Pages* publication, inside wiring installation and maintenance, and tree trimming, that are neither basic services nor of the same fundamental character as basic services. While many of these traditional services facilitate the provision of basic services, they would remain fundamentally different from basic services even if provided through the use of computer processing applications. The vintage of a service simply does not imply that its provision in connection with basic services would not alter their fundamental character.[56] Similarly, the possibility that Centrex customers may be using CDAR to obtain information they may find useful in managing their telephone operations is irrelevant. We would expect that most telephone services would provide customers with information they might find useful, and we can imagine any number of computer processing applications that might help subscribers manage their telephone service. The information CDAR provides, however, unlike the information provided by each of the services we determined to be adjunct services, does not help telephone companies provide or manage basic telephone services.[57]

46. Moreover, in the *Computer III Phase II Order*, we stated that we would view the computing facilities carriers use to provide services otherwise falling within clause 2 of our definition as the equivalent of an end user in determining whether the services involve "end-to-end communications between or among subscribers."[58] Therefore, the exception stated in that *Order* for "communications between a subscriber and the network itself for call setup, call routing, call cessation, calling or called party identification, billing, and accounting"[59] is not applicable to CDAR. Only those communications that facilitate a carrier's own billing and accounting operations without changing the fundamental nature of those operations will be treated as communications for billing or accounting within the scope of this exception. Services, like CDAR, which provide information that is not useful to the carrier, fall outside the scope of this exception.

2. *Future Treatment of CDAR*

47. In the *CDAR Waiver Order*, the Bureau authorized the BOCs to continue providing CDAR under tariff and on structurally unseparated bases, pending action on the subject petitions for reconsideration and our reexamination in *Computer III* of the overall requirements for the BOCs' enhanced services operations.[60] As a condition of that waiver, the Bureau required that the BOCs provide CDAR only as a separate offering, unbundled from basic Centrex features.[61] The Bureau, however, did not impose any specific accounting requirements with respect to the BOCs' CDAR operations. The Bureau found that it would be unduly costly to implement such requirements on an interim basis.[62]

48. Our decision to confirm that CDAR is an enhanced service makes it appropriate to address the future regulatory treatment of this Centrex feature. Under the new regulatory framework adopted in the *Computer III* proceeding, the BOCs are required to implement certain nonstructural safeguards prior to offering any enhanced service on a structurally unseparated basis. The nonstructural safeguards include requirements for the allocation of joint and common costs to the BOCs' enhanced service operations.[63] The nonstructural safeguards have not been applied to the BOCs' CDAR operations, which have been conducted under tariff and on an unseparated basis pursuant to the *CDAR Waiver Order*. Accordingly, the BOCs have not filed any plans under *Computer III* for those operations, and the cost allocation manuals the BOCs have filed pursuant to our *Joint Cost Order* [64] may not provide accurate cost allocation methodologies for those operations.

49. While the waivers granted in the *CDAR Waiver Order* were to lapse upon the effective date of this *Order*, a limited extension is necessary to enable the BOCs to adapt to the new regulatory regime. BOCs are currently providing CDAR on an unseparated, but tariffed, basis pursuant to these waivers, apparently in competition with other offerings.[65] Because we see no reason to reopen the waiver proceedings for CDAR,[66] we will extend the waivers granted in the *CDAR Waiver Order* to the extent they authorize the BOCs to continue offering CDAR on a structurally unseparated basis. This action will be subject

to the following conditions. First, each BOC must account for CDAR as a nonregulated activity. Within thirty days of the release of this *Order*, each BOC proceeding under this waiver must file any amendment to its Part 32 cost allocation manual that may be required for its CDAR operations, and the BOCs' authority to proceed under this waiver will be subject to whatever action, if any, this Commission may deem necessary or appropriate in response to the amendments that are filed.

50. Second, each BOC must detariff CDAR on or before October 1, 1988. In the *CDAR Waiver Order*, the Bureau allowed the BOCs to continue to provide CDAR under tariff pending resolution of its regulatory status. There is no longer any justification for allowing the BOCs to continue providing CDAR under tariff on any extended basis. This limited extension will permit the detariffing process to proceed in an orderly manner. [67]

V. ORDERING CLAUSES

51. Accordingly, IT IS ORDERED, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 405, that the petitions for reconsideration of the *NATA/Centrex Order* ARE DENIED.

52. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201 to 205, 403, and 404 of the Communications Act of 1934, as amended, 47 U.S.C. Secs. 4(i), 4(j), 201-05, 403, and 404, that the waivers granted by the Chief, Common Carrier Bureau, in the *CDAR Waiver Order* ARE EXTENDED to the extent, and subject to the conditions, set forth in this *Order*.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX

A. *CENTREX FEATURES*

Automatic Overflow to DDD : This feature causes calls placed on a subscriber's private line to be rerouted to the toll network if all tie-line routes are busy. DDD refers to direct distance dialing.

Automatic Route Selection-Deluxe (ARS-D): Automatic Route Selection-Deluxe allows the customer who has access to more than one type of service to specify preferred routing for various types of calls. The routing options can allow the customer to choose among carriers, among a given carrier's different services, or both.

Centrex: In this service, the telephone company switches calls among a customer's internal telephone stations as well as calls between the customer's stations and the rest of the world. Such switching is usually performed at the central office of the local exchange company.

Centrex Customer Change Feature (CCCF): This feature allows a customer to use a data terminal on his or her premises to transmit to the central office desired changes in his or her Centrex service.

Customer Dialed Account Recording (CDAR): This feature allows the SMDR customer to tag each call on the SMDR record with numbers of his or her own choosing. *See also* Station Message Detail Recording (SMDR), *infra*.

Deluxe Queuing: This feature lets the subscriber have an attempted call "held" until it can be completed. The "holding" can be accomplished with the calling telephone off hook or on hook; in the latter case the calling telephone rings when the call is completed.

Facilities Administration and Control: This feature lets the ARS-D subscriber keep particular telephone stations from being used to access Centrex features that the subscriber does not wish to have accessed from those stations. *See also* Automatic Route Selection-Deluxe (ARS-D), *supra*.

Facility Restriction Levels: This feature lets the ARS-D subscriber determine the types of calls that can be made over particular lines. *See also* Automatic Route Selection-Deluxe (ARS-D), *supra*.

Forwarded Call Information : A subscriber may use this feature to obtain information regarding lines equipped with call forwarding features. When a call is forwarded from one to another of the subscriber's stations, a separate data channel sends to a customer-provided data modem: (a) the number of the station originally called; (b) a status code indicating the reason for forwarding (e.g., line busy); (c) a two-digit code indicating which automatic call distributor or uniform call distributor is involved; (d) a code indicating the line to which the call was sent; and (e) the calling number, if the call originated within the same central office.

Station Message Detail Recording (SMDR): This feature provides the customer with a record of the date, time, duration, and called number of each outgoing call. The information is provided on paper, on computer tape, or through on-line transmission.

Traffic Management Data (Pollable): This feature allows the customer to obtain traffic information directly from his or her stations instead of having the telephone company collect the information and send it to the customer.

B. *RESIDENTIAL TELEPHONE SERVICES*

Call Block: This service allows the subscriber to block unwanted calls from designated numbers.

Call Monitor: This service allows the subscriber who has appropriate customer premises equipment (CPE) to identify a calling party's telephone number. The central office transmits the calling party's telephone number to the called party during ringing stage of a call. The called party's special CPE then displays this telephone number.

Call Return: This service allows the subscriber to place, without dialing the station's number, a call to the last station from which his or her line was called.

Call Selector: This service allows the subscriber to specify telephone numbers that will cause a unique ring or call waiting tone.

Call Trace: This service allows the customer to cause the last call received to be traced and the number from which it originated to be transmitted to the police and/or to the telephone company.

Call Tracking: This service allows the customer to identify the calling party's telephone number. Within a half second of a call's arrival at the central office, a teletypewriter or computer terminal on the customer's premises

receives, via a private line channel, the hour, minute, and second of the call's arrival, the number called, the calling party's telephone number, and the status of the call.

Local Area Signalling Service (LASS): This is a package of features that use common channel interoffice signalling circuits to transmit the calling party's number and other information to the central office. Each of the residential telephone services defined in this Appendix are LASS features.

Preferred Call Forwarding: This service allows the call forwarding subscriber to specify which incoming calls he or she wants forwarded.

Repeat Dialing: This service allows the subscriber to place, without redialing, a call to the last number called from his or her line.

FOOTNOTES

[1] *North American Telecommunications Ass' n*, 101 FCC 2d 349 (1985) (*NATA/Centrex Order*).

[2] 47 C.F.R. Sec. 64.702(a).

[3] *NATA/Centrex Order*, 101 FCC 2d at 368.

[4] 47 C.F.R. Sec. 64.702.

[5] Petitions of the Bell Atlantic Telephone Companies, *et al.*, *Memorandum Opinion and Order*, Mimeo No. 1606 (released Dec. 23, 1985)(*CDAR Waiver Order*).

[6] *Id.* at 10, para. 17.

[7] *Id.* at 10-11, paras. 17, 19.

[8] Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 2 FCC Rcd 3072, 3081, para. 69 (1987)(*Computer III Phase II Order), recon.*, 3 FCC Rcd 1150 (1988).

[9] Second Computer Inquiry, *Final Decision*, 77 FCC 2d 384 (*Computer II Final Decision), modified on reconsideration*, 84 FCC 2d 50 (1980)(*Computer II Reconsideration Order), modified on further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further reconsideration*, FCC 84-190 (released May 4, 1984).

[10] *Computer II Final Decision*, 77 FCC 2d at 420.

[11] 47 C.F.R. Sec. 64.702(a).

[12] *Computer II Final Decision*, 77 FCC 2d at 420.

[13] *See Computer II Reconsideration Order*, 84 FCC 2d at 59-60; *see also* Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Notice of Proposed Rule Making*, CC Docket No. 85-229, 50 Fed. Reg. 33581, slip op. at 15-16, paras. 20-21 (Aug. 20, 1985)(*Computer III Phase I NPRM*).

[14] *Computer II Final Decision*, 77 FCC 2d at 421. As indicated by the express language that includes protocol processing in the enhanced services definition, our consideration of that activity was distinct from our consideration of adjunct services.

[15] *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 95 FCC 2d 1117 (1984)(*BOC* Separation Order), recon., 49 Fed. Reg. 26056 (June 26, 1984), *aff'd sub nom. Illinois Bell Telephone Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984), decision on recon. aff'd sub nom. *North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282 (7th Cir. 1985).

[16] 47 C.F.R. Sec. 64.702.

[17] *See Computer II Reconsideration Order*, 84 FCC 2d at 57-58.

[18] The features and services at issue are described in the Appendix to this Order.

[19] 77 FCC 2d at 421.

[20] *NATA/C entrex Order*, 101 FCC 2d at 358-59.

[21] *Id.* at 359-61.

[22] *Ib id.*

[23] *Id. at* 361-71. No one claimed that these features and services "employ computer processing applications that . . . act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information" within the meaning of clause 1 of the definition.

[24] *Id.* at 349.

[25] CDAR Waiver Order, *supra* n.5, slip op. at 11, para. 19.

[26] *Id.* at 10-11, para. 18.

[27] *Id.*, paras. 17, 19.

[28] *Computer III Phase I NPRM, supra* n.13, slip op. at 24-28, paras. 48-55.

[29] *Id.* at 41, para. 73.

[30] *Id.* at 40-41, paras. 72-73.

[31] *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 FCC 2d 958, 1017-18, paras. 108-10 (1986) *(Computer III Phase I Order), recon.*, 2 FCC Rcd 3035 (1987) *(Computer III Phase I Reconsideration Order), further recon.*, 3 FCC Rcd 1135 (1988).

[32] 2 FCC Rcd at 3081, para. 68. Based on our evaluation of competitive factors, cost considerations, and effects on the evolution of technology, we also expressly declined in that Order to modify our definition of enhanced services in order to reclassify protocol processing as a neutral adjunct service. Id. at 3078-80, paras. 45-58.

[33] *Id.*, para. 69, quoting Computer III Phase I NPRM, supra n.13, slip op. at 41, para. 73.

[34] *Second Computer Inquiry, Tentative Decision and Further Notice of Inquiry and Rulemaking*, 72 FCC 2d 358 (1979)(Computer II Tentative Decision).

[35] *NATA Reply at 8, quoting Computer II Tentative Decision*, 72 FCC 2d at 447 (text of proposed Section 64.702(b)).

[36] *See Computer III Phase II Order*, 2 FCC Rcd at 3081, para. 68; compare *Computer III Phase I NPRM, supra* n.13, slip op. at 40-41, paras. 71-73.

[37] See para. 9, *supra;* see also *NATA/Centrex Order*, 101 FCC 2d at 361-71.

[38] NATA Petition at 7.

[39] We restrict this discussion to clauses 2 and of the definition because no party has claimed that any of the Centrex features and residential telephone services at issue in this proceeding fall within clause 1 of the definition. See n.23, supra.

[40] Clause 2 applies to "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that . . . provide the subscriber additional, different, or restructured information." 47 C.F.R. Sec. 64.702(a).

[41] Clause 3 applies to "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that . . . involve subscriber interaction with stored information." 47 C.F.R. Sec. 64.702(a).

[42] *See* para. 8, *supra.*

[43] *Computer II Tentative Decision*, 72 FCC 2d at 390; see *Computer II Final Decision*, 77 FCC 2d at 417.

[44] *Computer II Tentative Decision*, 72 FCC 2d at 395 n.60.

[45] *Id.* at 447 (text of proposed Section 64.702(b)).

[46] *Computer II Final Decision*, 77 FCC 2d at 417-18.

[47] *Id.* at 421 (citations omitted).

[48] *Computer III Phase II Order*, 2 FCC Rcd at 3081, para. 69. Although this confirmation took place in the context of a discussion of protocol conversion, we described it as "general." Id. Accordingly, we view it as confirming the holding of the NATA/Centrex Order. *Compare Computer III Phase I NPRM, supra* n.13, slip op. at 41, para. 73.

[49] *Computer II Final Decision*, 77 FCC 2d at 495-96.

[50] *Computer II Reconsideration Order*, 84 FCC 2d at 59-60; *see also Computer III Phase II Order*, 2 FCC Rcd at 3081, para. 69.

[51] BellSouth Petition at 3.

[52] Bell Atlantic Reply at 3.

[53] See 47 C.F.R. Sec. 64.702(a).

[54] BellSouth Reply at 1-2.

[55] See para. 24, *supra*.

[56] *NATA/Centrex Order*, 101 FCC 2d at 361.

[57] See id. at 368.

[58] 2 FCC Rcd at 381, para. 69, quoting *Computer III Phase I NPRM, supra* n.13, slip op. at 41, para. 73.

[59] *Ib id.*

[60] *CDAR Waiver Order, supra* n.5, slip op. at 10.

[61] *Ib id.*

[62] *Ib id.*

[63] *Computer III Phase I Order*, 104 FCC 2d at 965.

[64] *See Separation of Costs of Regulated Telephone Service from the Costs of Nonregulated Activities, Report and Order*, 2 FCC Rcd 1298 (1987)(Joint Cost Order).

[65] *See American Telephone and Telegraph Co.*, 2 FCC Rcd 6723, 6723-24, paras. 6, 15 (1987). In that Order, the Bureau waived the comparably efficient interconnection (CEI) requirements for AT&T's subaccount billing (SAB) services. Although the Bureau stated that CDAR and SAB appear to be similar services, that waiver applies only to AT&T. Id. at 6725-26, para. 19 & n.33.

[66] See generally *Computer III Phase I Reconsideration Order*, 2 FCC Rcd at 3047-48, para. 85.

[67] Other telephone companies should note that our interpretation of applicable Computer II and Computer III requirements precludes them from offering CDAR as a tariffed service.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Editorial Amendments of Parts 0
and 64 of the Commission's Rules

ORDER

Adopted: June 24, 1988; Released: July 21, 1988

By the Managing Director:

1. By this Order Part 0 and 64 of the rules are amended to simplify, clarify and update them to reflect current organizational arrangements and functional assignments at the Federal Communications Commission.

2. Also, various rule changes are made concerning National Security and Emergency Preparedness related activities. Included are those changes required to transfer functions of the former Emergency Communications Division (ECD) to the Management Planning and Program Evaluation Office/Office of the Managing Director. Part 64, Appendix A, Sections 7 and 10 are also amended to indicate that the Common Carrier Bureau is responsible for receiving and processing restoration priority (RP) certification applications instead of the Emergency Communications Division staff. These changes were previously approved by the Commission. The public should note that changes to the RP system are now under consideration by the Commission. *Notice of Proposed Rule Making in General Docket 87 - 505*, 2 FCC Rcd 724 (1987).

3. Because these amendments concern rules of agency organization, procedures or practices, the notice and comment provisions of the provisions of the Administrative Procedure Act are not applicable. *See* 5 U.S.C. Section 553(b)(A). These rules are not considered substantive in nature and are therefore effective upon publication in the Federal Register. *See* 5 U.S.C. 553(d).

4. Because a notice of proposed rule making is not required, an initial and final regulatory flexibility analysis is not required. *See* the Regulatory Flexibility Act of 1980, 5. U.S.C. §§603 and 604.

5. This action is taken under the Managing Director's delegated authority to make nonsubstantive, editorial amendments of the Commission's rules and regulations. 47 C.F.R. §0.231(d).

6. ACCORDINGLY, IT IS ORDERED, pursuant to authority provided by §§ 4(i), 4(j), and 303(r) of the Communications Act, 47 U.S.C. §§154(i), 154(j) and 303(r), Part 0 and 64 of the Commission's Rules are amended as shown below.

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Minkel
Managing Director

RULE CHANGES

Parts O and 64 of Title 47 of the Code of Federal Regulations are amended as follows:

Part 0--Commission Organization

1. The authority citation for Part 0 is revised to read as follows:

Authority: 47 U.S.C. 154, 303 unless otherwise noted. Implement 5 U.S.C. 552, unless otherwise noted.

2. 47 C.F.R. 0.1 is revised to read as follows:

§0.1 The Commission

The Federal Communications Commission is composed of five (5) members who are appointed by the president subject to confirmation by the Senate. Normally, one Commissioner is appointed or reappointed each year, for a term of five (5) years.

3. 47 CFR 0.5 is amended by revising paragraph (b) and deleting paragraphs (b)(1) through (b)(7).

§0.5 General Description of Commission Organization and Operations

* * * * *

(b) Staff responsibilities and functions. The organization and functions of these major staff units are described in detail in Sections 0.11 through 0.161. The defense and emergency preparedness functions of the Commission are set forth separately, beginning at Section 0.181. For a complete description of staff functions, reference should be made to those provisions. (*See* also the U.S. Government Organization Manual, which contains a chart showing the Commission's organization, the names of the members and principal staff officers of the Commission, and other information concerning the Commission.)

* * * * *

4. 47 CFR 0.6 is removed.

5. 47 CFR 0.11 is amended by revising paragraph (b) to read as follows:

§ 0.11 Functions of the Office

* * * * *

(b) The Secretary is the official custodian of the Commission's documents.

6. 47 CFR 0.12 is removed.
7. 47 CFR 0.16 is removed.
8. 47 CFR 0.32 is removed.
9. 47 CFR 0.42 is removed.
10. 47 CFR 0.62 is removed.
11. 47 CFR 0.92 is removed.

12. 47 CFR 0.112 is removed.

13. 47 CFR 0.121 is revised to read as follows:

§0.121 Location of Field Installations

(a) Field offices are located throughout the United States. For the address and phone number of the closest office contact the Field Operations Bureau or see the U.S. Government Manual.

(b) Protected field offices are located at the following geographical oordinates:

Allegan, Michigan
4236§ 20" N. Latitude
8557§ 20" W. Longitude

Anchorage, Alaska
6109§ 43" N. Latitude
14959§ 55" W. Longitude

Belfast, Maine
4426§ 42" N. Latitude
6904§ 58" W. Longitude

Canandaigua, New York
4254§ 48" N. Latitude
7715§ 59" W. Longitude

Douglas, Arizona
3130§ 02" N. Latitude
10939§ 12" W. Longitude

Ferndale, Washington
4857§ 21" N. Latitude
12233§ 13" W. Longitude

Grand Island, Nebraska
4055§ 21" N. Latitude
9825§ 42" W. Longitude

Kingsville, Texas
2726§ 29" N. Latitude
9753§ 00" W. Longitude

Laurel, Maryland
3909§ 54" N. Latitude
7649§ 17" W. Longitude

Livermore, California
3743§ 30" N. Latitude
12145§ 12" W. Longitude

Powder Springs, Georgia
3351§ 44" N. Latitude
8443§ 26" W. Longitude

Sabana Seca, Puerto Rico
1827§ 23" N. Latitude
6613§ 37" W. Longitude

Santa Isabel, Puerto Rico
1800§ 26" N. Latitude
6622§ 32" W. Longitude

Vero Beach, Florida
2736§ 21" N. Latitude
8038§ 06" W. Longitude

Waipahu, Hawaii
2122§ 45" N. Latitude
15759§ 54" W. Longitude

14. 47 CFR 0.132 is removed.

15. 47 CFR 0.152 is removed.

16. 47 CFR 0.176 is removed.

17. 47 CFR 0.183 is revised to read as follows:

§0.183 Emergency Communications Administration.

The Management Planning and Program Evaluation Office, Office of the Managing Director, coordinates the National Security and Emergency Preparedness (NSEP) activities of the Federal Communications Commission including Continuity of Government planning and the Emergency Broadcasting System (EBS) and other such functions as may be delegated during a national emergency or activation of the President's war emergency powers as specified in Section 706 of the Communications Act; maintains liaison with FCC Bureaus/ Offices, other government agencies, the telecommunications industry and FCC licensees on NSEP matters; and, as requested, represents the Commission at NSEP meetings and conferences.

18. 47 CFR 0.186 is revised to read as follows:

§0.186 Emergency Relocation Board.

(a) As specified in the Commission's Continuity of Government Plan and consistent with the exercise of the War Emergency Powers of the President as set forth in Section 706 of the Communications Act of 1934, as amended, an Emergency Relocation Board will be convened at the Commission's Headquarters or other relocation site designated to serve as Primary FCC Staff to perform the functions of the Commission following the announcement of national level mobilization of the Federal government by the President or other designated authority; in the absence of such announcement, immediately following receipt of an attack warning signal; or in the absence of either announcement or attack warning, immediately following an actual attack.

(b) The Board shall comprise such Commissioners as may be present and able to act. In the absence of the Chairman, the Commissioner present with the longest seniority in office will serve as acting Chairman. If no Commissioner is present and able to act, the person designated as next most senior official in the Commission's Continuity of Government Plan will head the Board.

19. 47 CFR 0.231 is amended by adding paragraph (l) to read as follows:

§0.231 Authority Delegated

* * * * *

(l) The Secretary, acting under the supervision of the Managing Director, serves as the official custodian of the Commission's documents and shall have authority to appoint a deputy or deputies for purposes of custody and certification of documents located in Gettysburg, Pennsylvania or other established locations.

20. 47 CFR 0.284 is amended by revising paragraph (a)(4) to read as follows:

§0.284 Actions taken under delegated authority

(a)* * *

(4) Matters involving emergency communications, including the issuance of Emergency Broadcast System Authorizations (FCC Form 392)-- Office of the Managing Director.

* * * * *

21. 47 CFR 0.314 is amended by revising paragraph (g) to read as follows:

§0.314 Additional Authority Delegated

* * * * *

(g) To act on and make determinations on behalf of the Commission regarding requests for reassignment of restoration priority levels and assignment of new restoration priorities concerning the restoration in emergencies of common carrier-provided intercity private line service pursuant to Appendix A of Part 64 of the Commission's rules when, for any reason, the Commission's RP processing staff cannot be contacted.

* * * * *

22. The title preceding 47 CFR 0.381 is revised to read as follows:

National Security and Emergency Preparedness Delegations

23. 47 CFR 0.383 is amended by revising paragraph (a) to read:

§0.383 Emergency Relocation Board, Authority Delegated

(a) During any period in which the Commission is unable to function because of the circumstances set forth in Section 0.186(b), all work, business or functions of the Federal Communications Commission arising under the Communications Act of 1934, as amended, is assigned and referred to the Emergency Relocation Board.

* * * * *

24. 47 CFR 0.387 is amended by revising paragraph (a) to read as follows:

§0.387 Other National Security and Emergency Preparedness delegations; cross reference

(a) For authority of the Chief of the Mass Media Bureau to issue Emergency Broadcast System Authorizations (FCC Form 392), see sections 0.284(a)(4) and 73.913.

* * * * *

Part 64 Miscellaneous Rules Relating to Common Carriers

25. The authority citation for Part 64 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, unless otherwise noted.

26. 47 CFR Part 64, Appendix A is amended by revising Section 7, subparagraph b. to read as follows:

Appendix A - Priority System for the Restoration of Common Carrier Provided Intercity Private Line Services

7. Certification

* * * * *

b. All other private line users are required to provide their request for a restoration priority directly to the FCC. This information is to be filed on FCC Form 915--Priority Request and Certification--and will be used by the Commission's RP processing staff (Common Carrier Bureau) in making a determination. Each request should be accompanied by a copy of an emergency communications plan or reference to an FCC approved plan for the individual user organization or for an industry [e.g.: Aeronautical Emergency Communications System (AECS)]. In addition, a recommendation from the associated Federal agency is required for restoration priority requests to the FCC that involve prearranged voluntary participation with the Federal government in emergencies. In applying for a restoration priority the user of a private line service accepts responsibility for making semi-annual appraisals of the criticality of the service, for making appraisals at the time of any change in the nature or use of the service, and for notifying the FCC promptly of discontinuation of the service or of any factors that may affect either the requirement for restoration priority or the level of priority.

Before the
Federal Communications Commission
Washington, D.C. 20554

Released: July 21, 1988

8940-ME

July 5, 1988

Jack W. Whitley, Esq.
Baker and Hostetler
1050 Connecticut Avenue, N. W.
Washington, D. C. 20036

Re: WYED-TV
Goldsboro, North Carolina
BTCCT-880115KJ

Dear Mr. Whitley:

This refers to the above-captioned application which seeks Commission consent to transfer control of Group H Broadcasting Corp., permittee of operating television station WYED-TV, Goldsboro, North Carolina, from Randall G. Harvey to George G. Beasley.[1]

Commission records indicate that Mr. Beasley controls broadcast stations WFTC(AM) and WRNS(FM), Kinston, North, Carolina. WFTC's 2 mV/m groundwave contour and WRNS' 1 mV/m contour encompass Goldsboro. Section 73.3555(b) generally proscribes the grant of a television construction permit to anyone who directly or indirectly owns, operates, or controls an aural broadcast station in the same market. Note 4 to Section 73.3555, however, provides that applications for UHF television facilities "will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest." You have requested a grant of the application pursuant to Note 4 to Section 73.3555.

In support of your request, you note that the financial projections for WYED-TV for the years 1988-1992 show a negative cash flow for each of these years. It is projected that, for eight months of 1988, alone, there will be a projected loss of805,000 and a negative cash flow of 553,000.[2] With respect to the radio stations, however, you state that these stations had a positive cash flow of over400,000 in 1987. Thus, if the transfer is granted, Mr. Beasley pledges to use the profits from his radio stations to offset the projected deficit in operating WYED-TV. You contend that allowing Mr. Beasley to use his radio stations to provide the substantial financial support necessary to operate WYED-TV will assure the development of Goldsboro's first local television station. Additionally, you state that Mr. Beasley is a lifetime Goldsboro resident and that WYED-TV and its viewers would be the beneficiaries of the wealth of his broadcasting experience.

You further state that despite the encompassment of Goldsboro by the signals of the commonly owned AM/FM combination, the radio and television facilities serve different markets. Moreover, you state, while there is overlap of the service contours of the radio and television stations, the overlap amounts to less than ten percent of the Grade A coverage of WYED-TV. This is due to the fact that WYED-TV's service is directed to the Raleigh-Durham television market, while the radio stations are serving either the Kingston or the New Bern/Greenville/Washington, North Carolina radio markets.

In further support of your request, you note that Goldsboro (population of 31,871) which is located in Wayne County (population 97,054) is served by three AM stations and two FM stations. In addition, Goldsboro receives 2 mV/m service from nine other FM stations licensed to nearby communities. You assert that Goldsboro receives Grade B service from North Carolina television stations WRAL-TV, Channel 5 (CBS), and WLFL-TV, Channel 22 (IND), Raleigh; WITN-TV, Channel 7 (NBC), Washington; WNCT-TV, Channel 9 (CBS), and WUNK-TV, Channel 25 (noncommercial educational), Greenville; WTVD-TV, Channel 11 (ABC), and WPTF-TV, Channel 28 (NBC), Durham; WCTI(TV), Channel 12 (ABC), New Bern; and WUNM-TV, Channel 19 (noncommercial educational), Jacksonville.[3] Moreover, based on information in the *Broadcasting / Cablecasting Yearbook*, 1988 edition, Goldsboro is served by a 30-channel-capacity cable television system of which 29 channels are activated. You point out the cable system has a 66 percent penetration in Goldsboro, i.e. 14,831 subscribers out of 22,413 homes that have access to the cable system. Finally, newspapers of general circulation in Goldsboro include the *Goldsboro News Argus* (daily); the *Metro Times* (weekly); and the *Waynesboro) Ledger* (weekly). In view of the foregoing, you argue that no undue concentration of the media will result from a grant of this application.

Based upon the above representations, we find under the circumstances of this case that permitting the aural/UHF television combination would be consistent with the public interest and past precedent. The Commission has allowed the establishment of aural/UHF television combinations where the support supplied by the radio station was essential to the development or viability of the television station. *See , e. g., Best Broadcasting Co., Inc.*, 54 RR 2d 1471 (1983); *WFIL, Inc.*, 1 FCC Rcd 290 (1986); *Ben C. Fisher*, 1 FCC Rcd. 293 (1986) (which authorized common ownership of radio and a UHF television station in Shaker Heights, Ohio, which is part of the Cleveland television market that ranks as the 11th largest market). Although Goldsboro is now considered part of the Raleigh-Durham television market which is ranked as the 35th largest market by Arbitron (1987-88 ranking), Goldsboro, in fact, is a small community and it appears unlikely that Goldsboro will sustain the operation of an independent UHF television station. As noted above, WYED-TV will compete with VHF, network-affiliated, television stations which provide Grade B or better service to Goldsboro. Furthermore, we note that WYED-TV is expected to operate at a deficit over the next four years, and the profits from the radio stations would offset these losses. Moreover, we believe that grant of this application will permit WYED-TV to draw upon the experienced management, *See , Metromedia, Inc.*, 54 RR 2d 1969 (1983), and financial resources of a broadcaster who is a life-long resident of Goldsboro. Further, grant of the application would foster the development of UHF television in Goldsboro and assure the viability of the community's first local commercial television station. Finally, in view of the other broadcast services available in the area and the significant

cable penetration, we find that no undue concentration of the media will result from permitting common ownership of the radio and television stations.

Therefore, having found the applicants fully qualified and that the public interest, convenience and necessity would be served, the application (BTCCT-880115KJ) for Commission consent to transfer control of Group H Broadcasting Corp. from Randall G. Harvey to George G. Beasley IS GRANTED.

BY DIRECTION OF THE COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] WYED-TV began operations (under program test authority) on April 13, 1988.)

[2] The financial projections for station WYED-TV for the years 1989-1992 are as follows:

	1989	1990	1991	1992
profit or (loss):	(1,006,000)	(634,000)	(434,000)	(307,000)
cash flow:	(334,000)	(147,000)	(193,000)	(107,000)

[3] According to the *Television and Cable Factbook*, 1987 edition, the net weekly circulation of these stations in Wayne County are as follows:

3A>

WRAL-TV, Raleigh, 50 percent and over

WLFL-TV, Raleigh, between 5 and 24 percent

WITN-TV, Washington, 50 percent and over

WNCT-TV, Greenville, 50 percent and over

WUNK-TV, (noncommercial ed.), Greenville, not available

WTVD-TV, Durham, 50 percent and over

WPTF-TV, Durham, between 25 and 49 percent

WCTI(TV), New Bern, 50 percent and over

WUNM-TV, (noncommercial ed.), Jacksonville, not available

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Waiver of

SIGMA TELECOMMUNICATIONS — File No. 579274-YX

Application to use certain of the 150 original 800 MHz conventional frequencies in a trunked mode of operation

ORDER

Adopted: July 8, 1988; Released: July 21, 1988

By the Chief, Private Radio Bureau:

1. The Chief of the Private Radio Bureau has for consideration a request for waiver of Section 90.615 of the Commission's Rules[1] filed by Sigma Telecommunications (Sigma). Frequencies available under Section 90.615 may only be used for conventional operations. Trunked operation is not permitted. Sigma desires to combine frequencies licensed as four conventional SMR stations[2] with one channel from its 21 channel trunked system to form a separate five channel trunked system. Sigma argues that allowing it to combine these frequencies and operate in the trunked mode will increase spectrum efficiency. Sigma further contends that such action will not adversely affect any other licensees since it already has *exclusive* use of all five frequency pairs.

2. We agree with Sigma that allowing trunking on these frequencies would increase spectrum efficiency. That is one of the reasons we initiated an inquiry to determine whether the public interest would be served by permitting trunked operations on these frequencies.[3] There are other criteria besides spectrum efficiency, however, that are relevant to the disposition of Sigma's request for waiver. We must determine whether grant of the waiver would undermine the fundamental purpose that the rule was intended to accomplish.[4]

3. The frequencies specified in Section 90.615 were set aside for the needs of users who desire the use of 800 MHz spectrum but do not have a requirement for a trunked system. It is, however, possible to obtain exclusive use of such frequencies through meeting a minimum loading requirement. Thus, once exclusivity has been established, the licensee effectively controls use of the frequency. The frequency pairs requested are licensed to Sigma on an exclusive basis, thus Sigma controls the frequency use. Sigma's request therefore is essentially to change the technology used on the frequencies to improve spectrum efficiency. Because no other entity could have access to these frequencies, the particular use Sigma makes of the frequencies will have no adverse affect on any other party. To the contrary, additional trunking may permit an increase in spectrum efficiency and promote significant public benefits. We conclude, therefore, that grant of the requested waiver is warranted.

4. Accordingly, Sigma's request for waiver of Section 90.615 of the Rules to permit the use of these four frequency pairs in the trunked mode is granted, pursuant to Section 0.331 of the Rules,[5] subject to it filing the appropriate frequency coordination documents,[6] and subject also to the outcome of any further proceedings in PR Docket 87-213. The co-channel protection criteria for conventional systems specified in Section 90.621 of the Rules[7] will remain applicable despite the fact that these frequencies will be used in the trunked mode.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] 47 C.F.R. § 90.615.

[2] The four SMR stations are licensed to Sigma and operate on frequencies available under Section 90.615.

[3] Notice of Inquiry, PR Docket 87-213, 2 FCC Rcd 3820 (1987), 52 Fed. Reg. 25265 (July 6, 1987). The Commission is currently in the process of reviewing the comments and reply comments filed in this proceeding.

[4] *See* WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969). *See also* Section 90.151 of the Commission's Rules, 47 C.F.R. § 90.151.

[5] *See* 47 C.F.R. § 0.331.

[6] Changing from a conventional SMR to a trunked SMR is a change in the class of station and therefore requires frequency coordination. *See* 47 C.F.R. § 90.175.

[7] See 47 C.F.R. § 90.621.

Before the
Federal Communications Commission
Washington, D.C. 20554

RAO Letter 12 Revised July 7, 1988

Released July 20, 1988

Responsible Accounting Officers

Re: Attestation Audits pursuant to the Joint Cost Order and Joint Cost Reconsideration Order (CC Docket 86-111)

As originally issued on April 11, 1988, RAO Letter No. 12 noted that in prescribing rules for the separation of costs of regulated telephone services from costs of nonregulated activities, the Federal Communications Commission had concluded independent audits would be an important aid in implementing its commitment to monitor compliance with cost allocation requirements. It also noted the Commission's conclusion that an appropriate level of assurance would be an examination leading to a positive opinion. Further, it noted the Commission's requirements that each operating company have an independent audit performed annually and that a positive opinion audit report be submitted each year attesting to the accuracy of the carrier's cost allocations as reported to the Commission. RAO Letter No. 12 responded to questions that had been raised regarding the Commission reports to which the auditors' attestation reports would apply, how and when they should be filed, and what the attestation would cover.

On May 12, 1988, the United States Telephone Association (USTA) requested reconsideration of several phrases in one of the seven items we identified among the minimum requirements for acceptable attestation letters.

The major issue raised in USTA's request was whether the independent auditors are responsible for (a) ascertaining that the accounting underlying the reports is consistent with the Commission's joint cost rules generally, or (b) consistent with the FCC approved cost manuals. USTA cited paragraph 253 of the *Joint Cost Order* as evidence of the Commission's intention to have the attestation apply to whether carrier accounting was consistent with the FCC approved manuals, as opposed to whether the manuals reflected the Commission's cost allocation rules. Further, USTA cited paragraph 186 of the *Order on Reconsideration* as evidence that the Commission did not want auditors to duplicate the manual review process the Commission would be performing. Specifically, USTA requests that we delete several phrases from the seventh requirement on page 2 of RAO Letter No. 12, as originally issued. We have enclosed these phrases in brackets and repeated the seventh requirement in its entirety below:

> 7. Provide an opinion whether or not the methodologies in place are in conformance with the cost allocation manual approved by the Federal Communications Commission, [are consistent with the Commission's rules for the assignment and allocation of cost between regulated and nonregulated activities and are consistent with the accounting for transactions with affiliates, including the valuation of assets and services in those transactions.] The opinion should also state whether or not the report results are an accurate application of those methodologies.

It was always the intention in RAO Letter No. 12, to have the independent auditors verify compliance with cost manuals the Commission has approved. In RAO Letter No. 12, as originally issued, reference to the Commission's Docket 86-111 rules were intended to emphasize that we wanted independent auditors to be responsible for transactions with affiliates as well as the assignment and allocation of costs between regulated and nonregulated activities conducted within the same corporate entity. Essentially the same results can be accomplished if, during the process of reviewing the cost manuals, we assure ourselves that affiliate transactions are adequately covered and the accounting methodology described is consistent with the Commission's rules for affiliate transactions. We believe our reviews of the cost manuals to date have accomplished this result and we plan to continue this process. As we see it, this leaves as the next logical step verification that the actual practice matches the description of the accounting methodology in the cost manual.

The auditors' reports should accompany the Report of Annual Revenue Requirement and Joint Cost Data, identified as Appendix C of the *ARMIS Order* (CC Docket 86-182, 2 FCC Rcd 5770 (1987), aggregated to the operating company level; and should attest to the accuracy of cost allocations reported therein, including the effects of transactions with affiliates. Both the auditors' reports and the Report of Annual Revenue Requirement and Joint Cost Data are to be filed April 1 of each year.

In order to facilitate the submission of the attestations by the independent auditors, we have prepared a sample attestation letter designed to provide the assurances the FCC is seeking. The sample letter is intended as a guide and will encompass the requirements of the *Joint Cost Order* and the *Joint Cost Reconsideration Order*. The attestation letters will undoubtedly vary according to the circumstances, and independent auditors should not view themselves as bound by the literal format of the sample letter which we have amended pursuant to the discussion in this letter.

At a minimum the letter should:

1. Identify the operating company entity;

2. Stipulate that the report is prepared for the Federal Communications Commission;

3. Identify the period covered by the report;

4. Stipulate that the report was prepared pursuant to Federal Communications Commission rules for the assignment and allocation of costs between regulated and nonregulated activities and for accounting for transactions with affiliates, including the valuation of assets and services in those transactions;

5. State that the examination was made in accordance with standards established by the American Institute of Certified Public Accountants and included such tests of the underlying records and such other procedures as were considered necessary under the circumstances;

6. Identify the scope and the extent of examination, including any limitations imposed on the scope of work or extent of the examination by the carrier, its affiliates, or any other circumstances (References should be made here to attached work plans);

7. Provide an opinion of whether the methodologies in place are in conformity with the cost manual approved by the Federal Communications Commission. The opinion should also state whether the reported results are an accurate application of those methodologies.

This Responsible Accounting Officer letter supercedes RAO Letter No. 12 as issued April 11, 1988 and is issued under Section 0.291 of the Commission's rules. Applications for review under Section 1.115 of the Commission's rules must be filed within 30 days from the release date indicated above (*See* Section 1 .4 (b)(4) of the Commission's rules).

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division

ATTACHMENT

To: Secretary
Federal Communications Commission

We have examined the accompanying Report of Annual Revenue Requirement and Joint Cost Data for (*Carrier Name),* which was prepared for the period ended (*Date),* pursuant to Federal Communications Commission rules for assignment and allocation of costs between regulated and nonregulated activities and for accounting for transactions with affiliates (47 CFR Sections 32.14, 32.23, and 32.27; and Section 64.901). Our examination was made in accordance with standards established by the American Institute of Certified Public Accountants and included such tests of the underlying records and such other procedures as we considered necessary under the circumstances [except for . . .]. These tests and procedures included . . . [statement of scope and the extent of examination and any limitations on either the scope or the extent of the examination]. [Reference should be made to attached work plans.]

In our opinion, the methodologies in place are consistent with the cost manual approved by the Federal Communications Commission [except for . . .]. The results contained in the accompanying report showing the separation of costs between regulated and nonregulated activities of (*Carrier Name)* are an accurate application of those methodologies.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-388

In Re

Amendment of the Commission's Rules
for Rural Cellular Service

THIRD ORDER ON RECONSIDERATION

Adopted July 6, 1988; Released July 6, 1988

By the Commission:

BACKGROUND

1. On May 18, 1988, the Commission released a *Further Order on Reconsideration*, CC Docket 85-388 (*Further Order*), in which we amended the Rules governing the filing of cellular Rural Service Area (RSA) applications. In the *Further Order* the Commission concluded, *inter alia*, that extensions of 39 dBu contours beyond RSA boundaries would not be permitted at the application stage. The Commission, acknowledging previous requests for clarification of its policy concerning 39 dBu contour extensions over water areas, concluded that this prohibition would extend to coastal areas, including the Gulf of Mexico. The Commission reasoned that such areas could adequately be served in conformance with the rules though the use of directionalized antennas or by operating the transmitters at reduced power. *Id.*, at para. 14.

2. Since the issuance of the *Further Order*, several parties have expressed serious concern over the issues raised by the restrictions on contour extensions over water.[1] Certain petitioners have submitted specific engineering evidence which demonstrates that coverage of certain coastal areas in compliance with the current rules is virtually impossible without either significantly impairing the quality of cellular service to be provided to coastal communities by moving transmitters inland,[2] or increasing capital outlays for system construction by millions of dollars. [3] In some cases, such as the Florida Keys, coverage in compliance with the current rules is impossible, notwithstanding any of the above measures. In addition, petitioners maintain that enforcement of the contour extension prohibition would burden the Commission's administrative resources, because applicants would initially propose systems designed to comply with the rules as they now stand, and once selected would file amendments seeking permission for the same contour extensions that were prohibited at the application stage.

DISCUSSION

3. For the reasons set forth below, we grant the petitions to the extent indicated. Petitioners have clearly demonstrated that the prohibition on 39 dBu contour extensions beyond the coastline will preclude the filing of compliant applications in some RSAs, such as the Florida Keys, and would severely impair the quality of cellular service provided to the public and require additional expenditures of millions of dollars in other coastal RSAs. We find that it would be extremely difficult for applicants to design systems for RSAs along some coastlines, particularly islands, in compliance with the current rules. *See Petroleum Communications, Inc.*, 1 FCC Rcd 511 (1986). Any benefits of requiring applicants to comply with the rules under these circumstances are clearly outweighed by the substantial engineering difficulties, administrative burdens, and additional capital outlays which in the long run would raise the cost and delay the implementation of cellular service to rural subscribers. Accordingly, in response to petitioners and on our own motion, we are amending Section 22.903(a)(1) to permit extensions over water where such water is not part of another RSA, Metropolitan Statistical Area (MSA), or New England County Metropolitan Area (NECMA), except where any such extension is into the Gulf of Mexico and not designed to serve the Florida Keys.[4]

4. We are addressing this issue on an expedited basis to clarify this for rural cellular applicants preparing their applications for the July 13 filing date. We recognize that parties have not had an opportunity to file oppositions on this question. However, the circumstances require immediate action. Moreover, based upon our experience in this proceeding, we do not anticipate any opposition to the action we are taking today. There were no pleadings opposing the petitions for reconsideration which addressd this issue prior to the *Further Order*, and none in opposition to the petitions now at hand. The absence of opposition, and the persuasive evidence before us lead us to conclude, therefore, that our amendment will eliminate a restriction which placed an undue burden on applicants, as contemplated by Section 553(d)(1) of the Administrative Procedure Act, 5 U.S.C. § 553(d)(1).

5. Accordingly, for the foregoing reasons, IT IS ORDERED, that the petitions of Gurman, Kurtis & Blask; Cellular Telecommunications Industry Assocation; GTE Mobilnet, Incorporated; and PacTel Cellular are GRANTED to the extent indicated herein; and

6. IT IS FURTHER ORDERED, that Part 22 of the Rules IS AMENDED as specified in the Rules Section appended to this Order. Pursuant to Section 553(d)(1) of the Administrative Procedures Act, this amendment will become effective upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX

Rules Section

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

Section 22.903 is amended by revising subsection (a)(1) to read as follows:

* * * * *

(1) *Rural Service Areas*. At the time of initial application filing, no CGSA or 39 dBu contour may extend beyond the boundaries of the Rural Service Area (RSA) into another RSA or any MSA or NECMA, or beyond the coastline of the Gulf of Mexico except to provide service to the Florida Keys. Any such initial application that has a CGSA or 39 dBu contour that extends into another RSA or MSA or NECMA, or beyond the coastline of the Gulf of Mexico will be returned as defective. An applicant may propose multiple CGSAs within the RSA. The 75% coverage of either the land area or the population of the MSA or NECMA does not apply to RSAs. The CGSA must be drawn on one or more U.S. Geological Survey map(s) with a scale of 1:250,000. For RSAs the CGSA map need only depict the area(s) encompassed by any CGSA(s) within the RSA (and that portion of the RSA visible on the map) and must clearly depict on the fac of the map the longitude, latitude and scale pursuant to Section 22.2. Within the CGSA, the applicant must depict each base station site and its respective 39 dBu contour as determined by the methods described in paragraph (c) below. An applicant must state that the combined 39 dBu contours of all base stations will cover at least 75% of the total CGSA.

* * * * *

FOOTNOTES

[1] *See* letter from Gurman, Kurtis & Blask (GK&B) to Kevin J. Kelley, Chief, Mobile Services Division (May 26, 1988); letter from Cellular Telecommunications Industry Association to Kevin J. Kelley (June 8, 1988); letter from GTE Mobilnet, Incorporated, to Kevin J. Kelley (June 10, 1988); letter from PacTel Cellular to Kevin J. Kelley (June 16,1988); letter from BellSouth Mobility, Inc. to Kevin J. Kelley (June 22, 1988); Petition for Expedited Reconsideration of *Further Order on Reconsideration*, filed by GTE Mobilnet, Incorporated (June 16, 1988); Emergency Petition for Reconsideration filed by GK&B (June 17, 1988); petition for partial reconsideration or clarification filed by Romulus Engineering (June 24, 1988). For administrative convenience, all parties in this proceeding, including those who have not filed formal petitions, will be referred to collectively as "Petitioners", and the respective filings shall collectively be referred to as "the petitions". Additionally, GK&B has filed an emergency motion to stay the effectiveness of the *Further Reconsideration* pending Commission action on its petition for reconsideration. The release of this Order predates the filing windows for RSA applications and thus moots that request.

[2] For example, GK&B notes that the definition of "coastline" includes certain inland waters, and that compliance with the prohibition in RSAs with coastal areas comprised of numerous bays and islands, such as Maine 3 and 4, would necessitate moving the transmitters further inland, which in turn would significantly reduce coverage of the shoreline communities.

[3] GTE Mobilnet noted that compliance with the restrictions on 39 dBu contour extensions in Hawaii would require an estimated expenditure of 4.5 million in order to build ten additional cells each with Effective Radiation Power (ERP) of less than one watt, as compared to a system comprised of "four reasonably powered cells" which would provide better and more economical coverage, but whose 39 dBu contour would extend somewhat beyond the coastline. Similarly, GK&B has submitted engineering evidence demonstrating that a four cell system with an estimated construction cost of2.5 million would be required to comply with the contour extension prohibition on the island of Kauai (Hawaii 1), whereas a single cell system which otherwise complied with the Commission's Rules could provide coverage of the major population centers of the island at a construction cost of750,000. Finally, GK&B also submitted engineering demonstrating that it is virtually impossible at any cost to design a system for the Florida Keys that would cover Key West (the most densely populated area of the Keys), since it measures less than two miles from north to south. BellSouth Mobility, Inc. raised similar concerns regarding other Florida Keys.

[4] Licenses have been separately authorized in the Gulf of Mexico. *See Memorandum Opinion* and Order, Mimeo No. 6337, released August 14, 1985 (CCB), aff'd 1 FCC Rcd 511 (1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 12, 1988

ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE IMPLEMENTATION SUBCOMMITTEE

The time has been changed for the next meeting of the Implementation Subcommittee of the Advisory Committee on Advanced Television Service. It now is scheduled for:

July 20, 1988
2:00 P. M.
Commission Meeting Room (Room 856)
1919 M Street, N.W.
Washington, D.C.

Any questions regarding this meeting should be directed to Dr. James J. Tietjen at (609) 734-2237 or David R. Siddall at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-388

In the Matter of

Amendment of the Commission's Rules
for Rural Cellular Service

ERRATUM

Released: July 12, 1988

On June 30, 1988, the Commission released a Fourth Notice of Proposed Rule Making (FCC 88-157) in the captioned proceeding. The comment and reply comment dates are hereby corrected to read: **July 25, 1988** and **August 2, 1988,** respectively.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 1176

Revisions to Tariff
F.C.C. Nos. 2, 4, and 9
Transmittal No. 1208

ORDER

Adopted: June 29, 1988; Released: June 30, 1988

By the Chief, Common Carrier Bureau:

1. The American Telephone and Telegraph Company (AT&T) filed Transmittal No. 1176 on April 5, 1988 and Transmittal No. 1208 on May 5, 1988. Both transmittals are scheduled to become effective on July 4, 1988. AT&T's filings introduce Integrated Services Digital Network (ISDN) capabilities to be used in conjunction with other AT&T services. US Sprint Communications Company (Sprint) filed a petition to investigate.[1] The Common Carrier Bureau (Bureau) also received two letters complaining about one of the ISDN optional features, the "Information Forwarding-2" system.[2] AT&T filed a reply to the Sprint Petition [3] and a letter responding to the letters of complaint.[4]

2. AT&T states that it is initiating ISDN capabilities in 18 cities to allow customers to integrate voice, data, image, and text communications.[5] AT&T explains that ISDN will integrate telecommunications and information services by eliminating the need for multiple, separate access arrangements for customers' voice, data, and facsimile networks. It asserts that ISDN meets a global standard so that customers may move and manage information anywhere in the world. *Id.* AT&T states that the Primary Rate Interface (PRI) is the essential element of its ISDN system and the building block for all future services that require ISDN capabilities. D&J at 1-2. It explains that PRI, which will be provided by an interexchange carrier, will permit a customer to share access facilities among several nodal services -- including AT&T's MEGACOM Service, MEGACOM 800 Service, and 56 Kbps Switched Digital Service -- using a single access link. *Id.* at 2. AT&T notes that the PRI makes possible two ISDN optional features: (1) Call-By-Call Service Selection which permits customers to program their systems to carry different services on an on-demand basis, and (2) 800 Information Forwarding-2 (INFO-2) which will enable customers of AT&T MEGACOM 800 Services to identify the telephone numbers of callers. D&J at 2.

3. Sprint claims that AT&T violates Section 61.38 of the Commission's rules, 47 C.F.R. § 61.38, by failing to provide adequate cost support data, by not disclosing the effect of ISDN on AT&T's other services, and by selecting 1992 as its "representative year" for cost recovery purposes. Sprint Petition at 1-2.[6] Sprint interprets the rule as requiring a "representative year" no more than three years into the future. *Id.* at 2-3. Finally, Sprint alleges that AT&T should include developmental costs in the rates for this offering. *Id.* at 3-4.

4. AT&T responds that ISDN is a capability, not a service, and that it will not have an "effect" on AT&T's services. AT&T Reply at 3. AT&T asserts that it complies with the requirements of Section 61.38(b)(2)(ii) by showing the financial effects of ISDN on its total interstate operations, and that any allocation of costs or revenues associated with ISDN among its service classifications would be arbitrary and meaningless. *Id.* at 4. It argues that 1992 is the earliest representative year it could choose because ISDN is a new offering. *Id.* AT&T notes that it is likely to take several years for local exchange carriers to develop the market to permit a "meaningful economic analysis" of this offering. *Id.* at 5. AT&T further claims that the rate base for ISDN contains costs for developing ISDN, and that these developmental costs were classified as either general expenses or maintenance expenses and allocated among the switched and private line categories on the basis of cumulative investment. *Id.* at 6-7.

5. The complaint letters raise concerns regarding the INFO-2 offering.[7] Ms. Johnstone expresses concern that this feature may facilitate the recording of telephone calls without the caller's knowledge. She asks for a special notation near the directory listing for any 800 number which uses this INFO-2 device, and that directory assistance operators be required to advise callers if a requested number uses this system. Ms. Johnstone fears that anonymous calls to police and emergency lines may decrease because of the possibility that the call may be recorded, and she objects to the sale of her telephone number by firms using INFO-2. Mr. Carli also opposes approval of the INFO-2 system, stating that it will allow businesses to identify the telephone number of the caller. He argues that such use is an invasion of privacy and that "junk" telephone calls will increase as lists of telephone numbers of consumers circulate in the business community. We will construe Mr. Carli's and Ms. Johnstone's letters as petitions to reject the INFO-2 portion of this tariff filing.

6. AT&T responds that the INFO-2 offering will not impair the privacy rights of individuals. AT&T June Letter at 2. It notes that pursuant to the United States Supreme Court's ruling in *Smith v. Maryland*, 442 U.S. 735 (1979), there is no legitimate expectation of privacy in the numbers dialed by telephone callers or in information the callers voluntarily give to third parties.[8] AT&T argues that the court's ruling there applies to automatic number identification (ANI) used in INFO-2 because the caller voluntarily conveys the ANI to the telephone company and the telephone user knows that ANI is recorded and used for a variety of legitimate business purposes.[9] Regarding the recording and selling of lists to businesses, AT&T states that many sources already exist from which businesses may obtain better customer lists than the lists obtainable from INFO-2.[10] Moreover, AT&T asserts that any privacy concerns regarding computerized telephone solicitation are best addressed by legislation rather than by "regulatory constraint on new technology."[11]

7. In response to the contention that use of INFO-2 will decrease the number of calls to emergency telephone lines, AT&T notes that the INFO-2 system transmits only

the billing number, not the identity of the calling party. Finally, AT&T asserts that complete anonymity is possible by calling from a pay telephone or a PBX station because the INFO-2 system reveals only the main PBX billing number. *Id.*

8. The Common Carrier Bureau has reviewed Transmittal Nos. 1176 and 1208, Sprint's petition, the complaint letters, and AT&T's reply. We find that Sprint and the two complainants have not presented any compelling argument that the tariff is patently unlawful so as to require rejection or that an investigation of the revisions is warranted at this time.

9. Accordingly, IT IS ORDERED that the petitions filed by US Sprint Communications Company, Phyllis Johnstone, and John Carli, against AT&T's Tariff F.C.C. Nos. 2, 4, and 9, Transmittal Nos. 1176 and 1208 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] US Sprint, Petition To Investigate, filed Apr. 20, 1988 (Sprint Petition).

[2] Letter from Phyllis Johnstone, Hinchinbrook Island, Alaska, to Federal Communications Commission, dated Apr. 7, 1988; and Letter from John Carli, Cordova, Alaska, to Federal Communications Commission, dated Apr. 5, 1988.

[3] AT&T, Reply, filed May 2, 1988 (AT&T Reply).

[4] Letter from T.H. Norris, AT&T, to Chief, Tariff Division, filed June 2, 1988 (AT&T June Letter).

[5] Transmittal No. 1176, Description and Justification (D&J) at 1.

[6] Section 61.38 (b) requires a carrier proposing a new service to submit with its tariff transmittal, *inter alia*, a study containing a projection of costs for a representative 12 month period.

[7] AT&T states that the ISDN capability will permit information forwarding as an optional feature. It explains that INFO-2 will provide automatic number identification which will allow a customer of AT&T's MEGACOM 800 service to identify the calling party's billing telephone number. D&J at 6-7.

[8] AT&T June Letter at 2.

[9] *Id.* at 2-3. According to AT&T, the Supreme Court recognized that telephone users know that they must convey numerical information to the telephone company and that the company records this information for a "variety of legitimate business purposes." 442 U.S. at 743.

[10] AT&T June Letter at 3.

[11] *Id.* at 4. AT&T notes that Alaska, the residence of Ms. Johnstone and Mr. Carli, has restricted computerized telephone solicitation. *Id.*, citing Alaska Stat. § 45.50.472.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

BRUCE M. SCHORSTEN — File No. 99471-CL-P-248-A-86

For a Construction Permit in the Domestic Public Cellular Radio Telecommunications Service for the Burlington, Vermont MSA

MEMORANDUM OPINION AND ORDER

Adopted; June 27, 1988; Released: July 18, 1988

By the Commission:

1. Bruce M. Schorsten (Schorsten) filed an application for review pursuant to Section 1.115 of the Commission's Rules. Schorsten maintains that the Common Carrier Bureau erred in denying his petition for reconsideration of the Mobile Services Division (MSD) action returning his Burlington, Vermont cellular radio application as defective. Schorsten's application was returned because it was signed pursuant to a power of attorney and not by him personally, in violation of Section 1.743(a) of the rules.[1] An opposition to the application for review has been filed by Diversified Cellular Limited Partnership (Diversified).[2] Schorsten has filed a reply to the opposition.[3]

2. In his application for review, Schorsten argues that the dismissal of his application was based on a misapplication of Section 1.743 of the Commission's rules. Schorsten contends that the MSD overlooked the critical distinction between attorneys at law and attorneys in fact, and viewed both as being governed by the restrictions included in Section 1.743(b) of the rules.

3. According to Schorsten, the plain language of Section 1.743(b) raises the expectation that the signing restrictions apply only where an attorney at law executes an application on behalf of a client in the course of a normal attorney-client relationship. Schorsten argues that the rule is not specific and leaves unanswered whether the term attorney refers only to attorney at law or attorney in fact, or both. Because Section 1.743(a) does not, on its face, limit execution by power of attorney, Schorsten reasons that Section 1.743(b) would seem to govern only signature by attorneys at law rather than attorneys in fact. Schorsten points out that it is common Commission practice in other services to accept applications signed by other kinds of duly authorized agents of applicants.

4. Schorsten claims that because the Commission has permitted applicants to correct faulty application signatures in the past, his application should also be allowed to be corrected in this case. Schorsten maintains that his application should be reinstated because it passed the initial intake screening, was included in the lottery, and was picked as the nonwireline lottery winner for Burlington, Vermont. By his amendment, dated December 12, 1986, Schorsten affirmed the information contained in the original application and provided a copy of the power of attorney authorizing Robert Napp, attorney in fact, to execute his application.

5. In the alternative, Schorsten argues that even if the distinction between attorneys at law and attorneys in fact is immaterial, his amendment brought the application into compliance with the rules. Again, Schorsten asserts that there is no factual or legal basis for distinguishing execution by duly authorized corporate employees or duly authorized agents of individual applicants. In neither case, Schorsten contends, can it be demonstrated that the Commission's authority or public interest will be prejudiced. Schorsten argues that since Section 1.743(b) should be limited to attorneys at law, and Section 1.743(a) cannot be read to prohibit execution of applications by an agent of an individual applicant, the MSD erred in returning the Schorsten application merely because it was executed by an agent pursuant to a power of attorney. Schorsten views this matter as one of first impression that the Commission should review and resolve and/or clarify.

DISCUSSION

6. The issues raised by Schorsten here are virtually identical to those raised in his petition for reconsideration and rejected by the Bureau. In that Order, the Bureau found that the MSD correctly returned Schorsten's application as defective, because it was signed by someone other than the applicant in violation of Section 1.743(a) of the rules. The exception in Section 1.743(b) provides that the applicant's attorney may sign an application in two cases: (1) where the applicant is physically disabled, or (2) where the applicant does not reside in the United States. If the exception is used, the attorney must set forth an explanation of why he is signing the application. In this case, Schorsten's application was signed pursuant to a power of attorney. Schorsten is correct that Section 1.743(a) makes no distinction between attorneys at law and attorneys in fact. However, Schorsten's application did not include an explanation of why he did not personally sign the application nor did Schorsten claim he was physically disabled or that he did not reside in the United States. Schorsten only claims unavailability to sign. This does not fall under the exception. Schorsten's attempt to draw a meaningful distinction between "attorney at law" and "attorney in fact" does not help his case. In either event, Schorsten's application did not conform to the requirements of Section 1.743. Equally unavailing is Schorsten's claim that the person signing with a power of attorney should be viewed in the same light as the duly authorized corporate employee who may sign in place of a corporate officer. The corporate application must be signed by an officer or duly authorized employee because a corporate application *must* be signed by some designated individual. However, there is no reason to designate someone other than an applicant to sign an individual application. Moreover, as the Bureau already found, Schorsten cannot cure his failure to properly certify the application by filing an amendment.

7. The cases cited by Schorsten did not involve certification requirements of the type required in cellular applications, distinguishing them from the case before us. In addition, the Commission stated clearly that the applicants in the cited cases had violated the rules. For example, in *Jane A. Roberts*, 29 F.C.C. 141 (1960) the Commission

held that an application signed by someone under color of a power of attorney did not comply with the rules. The Commission found, however, that the application was not void and could be amended *nunc pro tunc* to correct the defect if the equities support allowing such an amendment. The Commission found that the signature of the applicant's name by her husband was not done with intent to violate the Commission's rules, but because of unsound legal advice as to the effect of a power of attorney. In addition, the applicant was qualified to be a licensee, a hearing had been held and the construction of station facilities had been completed. In *Johnston Broadcasting v. FCC*, 175 F.2d 351 (1949) the court similarly held that the absence of verification could be cured by amendment (the application had been pending although in a defective state). In *Communications Gaithersburg, Inc.*, 60 FCC 2d 537 (1976), the Commission cited *Roberts* and *Johnston* in ruling that an application could be amended *nunc pro tunc* so long as the application was substantially complete when originally filed, the amendment was not the type which would require the assignment of a new file number under a particular section of the Commission's broadcast rules and if the equities of the situation so dictated. However, it has been the consistent practice of the MSD, the Common Carrier Bureau and the Commission to reject all cellular applications with faulty signatures. *American Cellular Network Corporation of Nevada*, 2 FCC Rcd 4350, 4531 n. 2 (1987). Such applications are not substantially complete, are unacceptable for filing, and may not be amended after the filing date or after the lottery to bring them into compliance with the cellular radio rules. *See Ronald F. Trinchitella*, 3 FCC Rcd 343 (Com. Car. Bur. 1987), *Douglas R. Casey*, 2 FCC Rcd 6414 (Mob. Svc. Div. 1987), *Clyde Pierce*, 2 FCC Rcd 3522 (Mob. Svc. Div. 1987) and *Johnstown Cellular Communications*, 1 FCC Rcd 1164 (Mob. Svc. Div. 1986). In the case at hand, we have been presented with no evidence that would distinguish this case from all the other cellular radio cases that have been rejected for failing to comform to the requirements of Section 1.743 and that would warrant us granting a waiver of that rule.

8. In authorizing the Commission to utilize lottery procedures, Congress accorded the Commission broad discretion to establish standards by which applications are preliminarily reviewed for inclusion in the lottery.[4] Requiring applicants to certify that their applications meet with all applicable Commission rules is a proper means of addressing the Congressional objective of ensuring that only those applications that are deemed acceptable for filing by the Commission be included in the lottery. *See Cellular Lottery*, 59 Rad. Reg. 2d (P&F) 407, 410 (1985); Section 22.913(b)(3) and *Clyde Pierce*, *supra*. Once the lottery is held, the tentative selectee's application is carefully reviewed to ensure its compliance with the cellular application standards and will be dismissed for failure to do so. Subsequent review of Schorsten's application, after the lottery, revealed its defect. Thus, disqualification of Schorsten's application fully complied with Commission rules and the overall legislative intent of making an important new technology available to the public in an expeditious manner. The arguments raised by Schorsten do not warrant reversal of the Bureau Order.[5]

9. Accordingly, IT IS ORDERED, that the Application for Review filed by Bruce M. Schorsten, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster
Acting Secretary

FOOTNOTES

[1] Section 1.743(a) provides in part that applications, amendments and related statements of fact required by the Commission "shall be personally signed by the applicant, if the applicant is an individual; by one of the partners, if the applicant is a partnership; by an officer or duly authorized employee, if the applicant is a corporation. . . ." Section 1.743(b) provides that an applicant's attorney may sign the required documents "in case of the applicant's physical disability, or in case the applicant does not reside in any of the contiguous 48 States of the United States or in the District of Columbia." This rule was amended recently to bring Section 1.743(b) into conformity with Sections 73.3513(b) and 1.913(b) of the rules which govern the signing of broadcast and private radio applications, respectively. However, the outcome of our decision would not have been different had the amended rule been in effect at the time Schorsten's application was filed. *See* Revision of Section 1.743 of the Commission's Rules and Regulations, FCC 88-137, released April 27, 1988.

[2] Diversified is the fourth-ranked applicant for the non-wireline cellular system construction permit to serve the Burlington, Vermont NECMA.

[3] Schorsten filed a motion to strike Diversified's opposition to which Diversified has filed an opposition to motion to strike. Schorsten responded with a reply to opposition to strike. Schorsten argues that Diversified is not a party to this proceeding, has not participated in any of the earlier stages of the proceeding, and should not now be allowed to participate in the proceeding. We have not relied on Diversified's comments in reaching our decision and do not rule on the motions.

[4] Conference Report on Communications Amendments Act of 1982, Conference Report No. 97-765, 97th Cong., 2d Sess. 39 (1982).

[5] If Schorsten wishes to challenge the Commission's rules, the proper method for doing so is to file a request for a Rule Making under Section 1.401 of the Commission's rules and not through the adjudicatory process.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-426

In re Applications of

LNJ COMMUNICATIONS *et al.* File No. BPH-851219MD

For Construction Permit for a New FM Station on Channel 225A (92.9 MHz) in Montecito, California

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 1988; Released: July 20, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Review Board has before it for consideration an appeal filed March 18, 1988 by Shawn Phalen from Administrative Law Judge Walter C. Miller's ruling requiring the production of documents over an objection based on a claim of privilege. *See Memorandum Opinion and Order*, FCC 88M-690, released March 11, 1988. The challenged documents largely consist of correspondence between communications counsel and Rick Phalen, who is the applicant's father and a Commission licensee, concerning Rick Phalen's acquisition of Station KQKS, Longmont, Colorado, and are being sought by a competing applicant – FM Montecito Limited Partnership – pursuant to issues exploring whether Rick Phalen is the real party-in-interest to the Montecito application, and/or whether Shawn Phalen deliberately concealed her father's acquisition of the Longmont broadcast station. The appeal contends that the documents are subject to attorney-client privilege claims by Shawn Phalen's father and are not in the applicant's custody. Appellant requests a ruling that she need not make the requested documents available to FM Montecito Limited Partnership.[1]

2. This case marks the second relatively recent occasion that the Board has been petitioned to rule on privilege claims where the documents in question have not, in the first instance, been examined by the presiding ALJ. *See also Metroplex Communications, Inc.*, 2 FCC Rcd 4513 (Rev. Bd. 1987). Here, by *Memorandum Opinion and Order*, FCC 88R-26, released May 13, 1988, we directed Phalen to file copies of the disputed documents for examination *in camera*. We further directed that the "documents for which a claim of attorney work product or attorney-client privilege are made should be identified, and the basis for the claim of privilege for each document should be specified with particularity and sufficient precision to permit the Board to evaluate the merits of the claim." Earlier, in *Metroplex*, *supra*, we conducted an initial examination of the relevant documents *in camera*, after the presiding ALJ held that the applicant had waived its privilege because it raised its claims only after objections to the production of documents on substantive grounds were rejected. We there noted that although "it would have been the better practice and sounder procedure if [the applicant] had made all of its privilege objections in the original opposition," that applicant was not on notice to that effect, and we could not conclude that the *Metroplex* applicant had consciously and voluntarily waived any relevant privileges.

3. Since the issuance of our May 13, 1988 order, we have received a second request to conduct an initial *in camera* inspection of challenged documents. *See* Appeal by Claudia Bratton filed May 23, 1988. In hindsight, we are persuaded that it would have been more conducive to the orderly and efficient dispatch of the Commission's business for *in camera* examinations of purportedly privileged documents to be made, in the first instance, by the presiding ALJ. In this regard, various ALJ prehearing orders since *Metroplex* have set forth procedures designed to ensure that privilege claims are raised in a timely and efficient manner. *See, e.g., Visalia Broadcast Limited Partnership*, FCC 88M-1547, released May 23, 1988; *Janice Faye Surber*, FCC 88M-1172, released April 20, 1988. In the instant case, it has lately come to our attention that the ALJ admonished those applicants seeking to raise privilege claims to follow the procedures set forth in *Patterson Communications Associates*, 41 RR 2d 640 (ALJ 1977) and 41 RR 2d 1027 (ALJ 1977), which opinions predate *Metroplex* and attempt to obviate the procedural confusion that gave rise to *Metroplex* in the first instance. *See LNJ Communications*, FCC 88M-1441, released May 16, 1988. In the future, therefore, we will requre that *in camera* examinations of allegedly privileged documents be left, in the first instance, to the ALJ presiding over the substantive case.

4. Turning back to the case at bar, we note that Shawn Phalen has not complied in the slightest degree with the procedures set forth in our prior order. Instead, she merely submitted a collection of documents, many of which appear to be public filings made before the Commission, and none of which is accompanied by the specific basis on which the privilege claim is allegedly based. Rather than here to conclude that Phalen has affirmatively waived her privilege by failing to comply fully with our prior order (since it is unclear that the client intended to formally waive any such rights), and in light of our discussion in paragraph 3, above, we will dismiss Phalen's appeal and refer the submitted documents to the ALJ for initial examination.[2] Should appellant fail to satisfy the ALJ as to any potential privileges with the specificity required by law, *see Metroplex*, the ALJ should reject the privilege claims.

5. ACCORDINGLY, IT IS ORDERED, That the Appeals filed March 18, 1988 by Shawn Phalen ARE DISMISSED, and the documents submitted to the Review Board pursuant to *Memorandum Opinion and Order*, FCC 88R-26, released May 13, 1988 ARE REFERRED to the presiding Administrative Law Judge for further action in accordance with this opinion.

6. IT IS FURTHER ORDERED, That the Motion to Dismiss as Moot Shawn Phalen's Appeal of Order Requiring Production of Privileged Documents Requested by LNJ Communications filed May 26, 1988 by Shawn Phalen, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Phalen also devotes a portion of her brief to the claim that addition of the real party-in-interest issue was erroneous, and she therefore requests that the Board delete that issue. Inclusion of that request in this appeal, however, is improper under 47 CFR §1.301(b), and the relief requested will be denied. Except for appeals as of right, such as the instant challenge to the ruling on the claim of privilege (*see* 47 CFR §1.301(a)(2)), appeals from other interlocutory rulings may be filed only if authorization is first obtained from the ALJ; and, here, permission was neither sought nor secured by Phalen.

[2] A second appeal was also filed by Phalen on March 18, 1988 from a ruling ordering it to produce documents requested by LNJ Communications. On May 26, 1988, Phalen filed a motion to dismiss that appeal as moot, pointing out that LNJ intends to have its application dismissed, and that only LNJ requested the particular documents underlying the appeal. In light of our disposition herein, however, we will also refer the pleadings applicable to that second Phalen appeal to the ALJ for appropriate disposition.

Before the
Federal Communications Commission
Washington, D.C. 20554

REISSUED

MM Docket No. 88-290

In re Applications of

SILENT MINORITY GROUP, INC.	File No. BPCT-870529KL
CENTRAL TEXAS BROADCASTING COMPANY, LTD	File No. BPCT-870630KE
CLEAR CHANNEL COMMUNICATIONS, INC.	File No. BPCT-870731KW

For Construction Permit
Bryan, Texas

HEARING DESIGNATION ORDER

Adopted: May 31, 1988; Released: July 18, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications for a new commercial television station to operate on Channel 28, Bryan, Texas.

2. Mary F. Watkins is the wife of Rodger B. Watkins, President and 50.2% stockholder of Silent Minority Group (Silent),[1] and she is an applicant (BPH-870331MQ) for a construction permit for a new FM radio station on channel 241 in Madisonville, Texas. Madisonville would be within the predicted Grade A contour of the proposed television station. There is a rebuttable presumption that the media interests of spouses are attributable to one another. Section 73.3555(b)(2) of the Commission's Rules proscribes common ownership, operation or control of a television station and an FM station if the principal community of the FM station would be within the predicted Grade A contour of the television station. Note 4 to the rule, however, provides for a case-by-case determination as to whether such common ownership, operation or control would be in the public interest in the case of a UHF television station. The application includes the following statement. "If Mary Watkins' application for Madisonville or this application for Bryan is granted while the other application is still pending, then either Mary Watkins or Silent will, as appropriate, amend this application to request exemption from the provisions of Section 73.3555(b)." We will specify an appropriate issue.

3. Central Texas Broadcasting Company, Ltd. (CTB), an applicant in this proceeding, is also the licensee of television station KXXV(TV), Channel 25, Waco, Texas. CTB proposes to operate its proposed television station "primarily as a satellite" of KXXV(TV). There will be substantial overlap between the predicted Grade B contours of the proposed television station and the licensed station. Section 73.3555(a)(3) of the Commission's Rules provides that no license for a television broadcast station shall be granted to any party if such party directly or indirectly owns, operates, or controls one or more television broadcast stations and the grant of such license will result in overlap of the Grade B contours of the existing and proposed stations. However, Note 5 to the rule exempts television stations that are "primarily satellite from a strict application of the Grade B overlap prohibition. Under Note 5, the Commission considers satellite proposals on a case-by-case basis in order to determine whether common ownership, operation or control of the stations in question would be in the public interest. CTB has requested consideration pursuant to Note 5. The other applicants in the proceeding each proposes a full-service operation. Accordingly, an issue will be specified with respect to the need for a satellite operation.

4. Section IV, FCC Form 301, requires an applicant for a television station to submit, as an exhibit, a brief description, in narrative form, of its planned programming service relating to the issues of public concern facing the proposed service area. CTB has not submitted such an exhibit. Accordingly, the applicant must submit an amendment which contains the requisite exhibit to the presiding Administrative Law Judge within 30 days after this Order is released.

5. Clear Channel Communications, Inc. (CCCI)[2] is also the licensee of stations KTAM(AM) and KORA(FM), Bryan, Texas. Section 73.3555(b)(1) and (2) of the Commission's Rules proscribes common ownership, operation or control of a television station and an AM or FM station if the principal community of the AM or FM station would be within the predicted Grade A contour of the television station. Note 4 of the rule, however, provides for a case-by-case determination as to whether such common ownership, operation or control would be in the public interest in the case of a UHF television station . CCCI has requested consideration of its proposal pursuant to Note 4 of the Rules. Accordingly, an appropriate issue will be designated.

6. CCCI's proposed tower is to be co-located with the nondirectional tower authorized for AM station KTAM, Bryan, Texas and it will be 1.18 km from the directional array of AM station WTAW, College Station, Texas. Because of the proximity of the proposed tower to KTAM and WTAW, grant of a construction permit to CCCI will be conditioned to ensure that KTAM's and WTAW's radiation patterns are not adversely affected by the construction of the proposed station.

7. The effective radiated visual power, antenna height above average terrain and other technical data submitted by the applicants indicate that there would be a significant difference in the size of the area and population that each proposes to serve. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered

under the standard comparative issue, for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. No determination has been reached that the tower height and location proposed by CTB would not constitute a hazard to air navigation. Accordingly, an appropriate issue will be specified.

9. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant would serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to the application of Silent Minority Group, whether the interests of Rodger B. Watkins in the applicant and the interests of Mary F. Watkins in the pending application (BPH-870331MQ) for a construction permit for a new FM station in Madisonville, Texas, are consistent with Section 73.3555 of the Commission's Rules and, if not, whether such ownership, operation or control would be consistent with the public interest.

2. To determine with respect to Central Texas Broadcasting Company, Ltd., whether circumstances exist which would make operation of a "satellite" necessary in Bryan, Texas.

3. To determine with respect to Clear Channel Communications, Inc., whether its ownership of stations KTAM(AM) and KORA(FM), Bryan, Texas, and the proposed television station, would be consistent with Section 73.3555(b)(1 and 2) of the Commission's Rules, and if not, whether common ownership, operation, or control of the stations in question would be consistent with the public interest.

4. To determine whether there is a reasonable possibility that the tower height and location proposed by Central Texas Broadcasting Company would constitute a hazard to air navigation.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

11. IT IS FURTHER ORDERED, That Central Texas Broadcasting Company shall submit an amendment which contains the exhibit required by Section IV, FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

12. IT IS FURTHER ORDERED, That in the event of a grant of the application of Clear Channel Communications, Inc., the construction permit shall be conditioned as follows:

Prior to construction of the tower authorized herein, permittee shall notify AM Station WTAW, College Station, Texas, so that, if necessary, the AM station may determine operating power by the indirect method and request temporary authority from the Commission in Washington, D.C. to operate with parameters at variance in order to maintain monitoring point field strengths within authorized limits. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the AM station. Both prior to construction of the tower and subsequent to the installation of all appurtenances thereon, a partial proof of performance, as defined by Section 73.154(a) of the Commission's Rules, shall be conducted to establish that the AM array has not been adversely affected and, prior to or simultaneous with the filing of the application for license to cover this permit, the results submitted to the Commission. During installation of the antenna authorized herein, AM Station KTAM, Bryan, Texas, shall determine operating power by the indirect method. Upon completion of the installation, antenna impedance measurements on the AM antenna shall be made and, prior to or simultaneous with the filing of the application for license to cover this permit, the results submitted to the Commission (along with a tower sketch of the installation) in an application for the AM station to return to the direct method of power determination.

13. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed by Clear Channel Communications, Inc. IS GRANTED, and the amendment IS ACCEPTED for 1.65 purposes only.

14. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed by Silent Minority Group, Inc. IS GRANTED, and the amendment IS ACCEPTED with no comparative benefit accruing to the applicant.

15. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 4.

16. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Service Division
Mass Media Bureau

FOOTNOTES

[1] The deadline for filing amendments to the Silent Minority Group application was September 18, 1987 (B" cut-off date). On January 27, 1988 Silent filed a petition for leave to amend its application accompanied by an amendment to reduce its antenna height in order to obtain FAA approval. The amendment is accepted for filing. However, no comparative advantage shall accrue to Silent as a result of the amendment.

[2] The deadline for filing amendments to the Clear Channel Communications, Inc. application was September 18, 1987 (B"" cut-off date). On October 6, November 17 and December 9, 1987, CCCI filed a petition for leave to amend its application accompanied by amendments which updates other media interests of the applicant and its principals. Also, the amendments updates the status of pending litigation. The petition will be granted and the amendments will be accepted for Section 1.65 purposes only.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
TELECOM BROADCASTING, INC. File No. CSG-88-032-ML

For modification of license of temporary fixed earth station E874238 to add as points of communication all satellites which have or will be consulted through INTELSAT for one-way transborder video service.

TELECOM BROADCASTING, INC. File No. CSG-88-033-ML

For modification of license of temporary fixed earth station E874239 to add as points of communication all satellites which have or will be consulted through INTELSAT for one-way transborder video service.

TELECOM BROADCASTING, INC. File No. CSG-88-034-ML

For modification of license of transportable earth station E870816 to add as points of communication all satellites which have or will be consulted through INTELSAT for one-way transborder video service.

TELECOM BROADCASTING, INC. File No. CSG-88-035-ML

For modification of license of transportable earth station E870980 to add as points of communication all satellite systems which have or will be consulted through INTELSAT for one-way transborder video service.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: June 30, 1988; Released: July 18, 1988

By the Chief, International Facilities Division:

1. Telecom Broadcasting, Inc. (TBI) has filed the above captioned applications requesting authority under Title III of the Communications Act of 1934, as amended, to modify several of its earth station licenses. The applications were placed on the Commission's public notice April 6, 1988. No comments were received.

2. TBI requests modification of its licenses for temporary fixed earth stations E874238 (File No. CSG-88-032-ML) and E874239 (File No. CSG-88-033-ML), and for transportable earth stations E870816 (File No. CSG-88-034-ML) and E870980 (File No. CSG-88-035-ML) to permit it to: 1) transmit video programming between the United States and points in Canada, Mexico, Central America and the Caribbean via all satellite systems that have completed the INTELSAT Article XIV(d) consultation process for the provision of such service; and 2) receive video programming from Canada and Mexico transmitted over all satellite systems consulted under Article XIV(d). TBI states that it will not operate as a common carrier and will not provide the proposed transmission services to the general public.

3. In 1981, following consultations with the Department of State, the Commission gave initial approval for use of U.S. domestic satellites for the transmission of certain international telecommunications services to points within the footprint of those satellites. The Commission determined that domestic satellites could be used for those services where INTELSAT is incapable of providing the service or where it would be clearly uneconomical or impractical to use the INTELSAT system for that service. The Commission stated that applications meeting this standard could not be implemented until the concurrence of the appropriate governmental entities had been obtained, the consultations requirement of INTELSAT Article XIV(d) had been fulfilled, and the Common Carrier Bureau issued an order authorizing implementation of service.

4. The proposals before us are similar, if not identical, to the many applications we have found to be in accord with the Commission's transborder policy. TBI is requesting authority to communicate with satellites that have already been approved under our transborder policy for the transmission of video programming to Canada, Mexico, Latin America and the Caribbean. Furthermore, its proposals are consistent with current INTELSAT Article XIV(d) consultations and, as a result, will cause neither technical interference nor significant economic harm to the global system. Since all prerequisites for the issuance of final authority have been completed, we conclude that grant of these applications is in the public interest.

5. Accordingly, IT IS ORDERED that the applications of TBI, File Nos. CSG-88-032-ML, CSG-88-033-ML, CSG-88-034-ML and CSG-88-035-ML, ARE GRANTED consistent with Attachments 1 and 2, and may be implemented without any further action by the Commission.

6. This authorization constitutes the final step for the provision of transborder services through domestic satellites only insofar as the U.S. regulatory process is con-

cerned. It does not, however dispense with any requirements that may be imposed by the other country involved.

7. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

8. This order is issued under Section 0.291 of the Commission's Rules on Delegations of Authority and is effective upon release. This order is subject to review under Section 1.115 of the Rules on Practice and Procedure. Review by the full Commission may be requested within 30 days of the date of public notice of this order (*see* Commission Rule 1.4(b)(2)) by writing Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail in time to be received by the due date.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT 1

U.S. Satellites Consulted Pursuant to Article XIV(d)

Satellites

*FEDEX A
*FEDEX B
GALAXY I
*GALAXY II
GALAXY III
*GALAXY IV
*GALAXY B
GSTAR I
GSTAR II
*GSTAR III
*COMSTAR III
COMSTAR D-4
*COMSAT GEN B
SPACENET I
*SPACENET II
SPACENET III
SATCOM IR
*SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
*SATCOM K-2
SBS V
SBS I
SBS II
SBS III
**SBS IV
TELSTAR 3A
TELSTAR 302
*TELSTAR 303
CONTEL ASC-I
CONTEL ASC-II
WESTAR IV
WESTAR V
*WESTAR B
*WESTAR (79° W)

* Consulted for Latin America/Caribbean services only.

** Consulted for Canada and Latin America/Caribbean services only.

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATION

Country	Service[s]	Satellite[s]
Anguilla	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Antigua and Barbuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
Barbados	T.V. receive-only	all Galaxy, Satcom and Westar satellites listed in Attachment 1
Belize	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bermuda	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
British Virgin Islands	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Canada	occasional pt.-to-pt. and full time video services and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus ANIK B, C1, C2, C3, D1 and D2
Cayman Islands	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1

Costa Rica	T.V. receive-only	all satellites listed in Attachment 1
Dominica	T.V., audio and data receive-only	all satellites listed in Attachment 1
Dominican Republic	T.V., audio and data receive-only	all satellites listed in Attachment 1
El Salvador	T.V. receive-only	all satellites listed in Attachment 1
Grenada	T.V., audio and data receive-only	all satellites listed in Attachment 1
Guatemala	T.V. and audio receive-only	all satellites listed in Attachment 1
Haiti	T.V., audio and data receive-only	all satellites listed in Attachment 1
Honduras	T.V. receive-only	all satellites listed in Attachment 1
Jamaica	T.V., audio and data receive-only (See note 3)	all satellites listed in Attachment 1
Mexico	Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus the Morelos I and II satellites
Monsterrat	T.V., and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV, Westar IV and V and Comstar D4
Panama	T.V., audio and data receive-only	all satellites listed in Attachment 1

St. Christopher-Nevis	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Lucia	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Vincent and the Grenadines	T.V., audio and data receive-only	all satellites listed in Attachment 1
Trinidad and Tobago	T.V. receive-only	all Galaxy, Satcom, Westar and Comstar satellites listed in Attachment 1
Turks & Caicos	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Venezuela	T.V. receive-only	all satellites listed in Attachment 1

Notes

1) With the exception of Mexico and Canada, which were consulted separately, all services (i.e. T.V., audio and data receive-only) can be provided to any point over any of the satellites listed in Attachment 1 even through only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT and no additional consultation is needed.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) All services authorized to Latin American/Caribbean locations are receive-only (i.e. can be received as a by-product of or incidental to U.S. domestic transmissions).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-88-006

Application for authority to provide satellite services between the United States and Cuba

ORDER

Adopted: June 30, 1988; Released: July 18, 1988

By the Chief, International Facilities Division:

1. The Communications Satellite Corporation (Comsat) through its World Systems Division requests authority pursuant to Sections 214 and 309 of the Communications Act of 1934, as amended, to provide space segment services for international communications between the United States and Cuba. Specifically, Comsat is requesting blanket authority to provide INTELSAT space segment services to authorized U.S. carriers who in turn will provide communications services between the United States and Cuba. The application was placed on public notice on October 21, 1987. No comments were received.

2. Since 1962, the United States has exercised an embargo upon trade and commercial relations between the United States and Cuba, as authorized by the Cuban Embargo Act of 1961, 22 U.S.C. 2370. The Department of State and Treasury have joint responsibility for implementation of the statute. The Secretary of the Treasury, namely, the Office of Foreign Assets Control, is responsible for carrying out the prohibition and is also authorized to make or revoke exemptions from the embargo. Exemption for telecommunications are handled on a case-by-case basis.

3. In its most recent Memorandum, Opinion, Order and Authorization, for authority to provide space segment services between the United States and Cuba, the Commission specifically ordered that "each applicant herein shall file with the Commission an appropriate application for authority before acquiring and operating additional facilities for telecommunications service to Cuba."[1] It is clear, therefore, that existing policy does not envision the granting of blanket authority for the provision of space segment service between the United States and Cuba.

4. Accordingly, IT IS ORDERED that the application File No. I-T-C-88-006 IS DISMISSED without prejudice to filing in the future when circumstances permit.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CALL AMERICA	File No. I-T-C-88-128
Application for authority to operate as an international resale carrier	
CALL USA, INC.	File No. I-T-C-88-129
Application for authority to operate as an international resale carrier	
EXECULINE OF SACRAMENTO, INC.	File No. I-T-C-88-130
Application for authority to operate as an international resale carrier	
Access Communications, Inc. d/b/a ACCESS LONG DISTANCE	File No. I-T-C-88-131
Application for authority to operate as an international resale carrier	
CLEARTEL COMMUNICATIONS	File No. I-T-C-88-133
Application for authority to operate as an international resale carrier	

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 30, 1988; Released: July 18, 1988

By the Chief, International Facilities Division:

1. The captioned five applications, filed on May 3, 5, and 6, 1988, respectively, by Call America, Call U.S.A. Inc. (CALLUSA), Execuline of Sacramento, Inc. (ESI), Access Communications, Inc. d/b/a Access Long Distance (ALD), and Cleartel Communications (Cleartel), request authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on May 18, and May 25, 1988, respectively. No comments were received.

2. The applicants are already providing domestic resale services. They now propose to resell international switched voice services in competition with other carriers already providing resale of such service. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Call America, CALLUSA, ESI, ALD and Cleartel.

4. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-88-128, I-T-C-88-129, I-T-C-88-130, I-T-C-88-131 and I-T-C-88-133 ARE GRANTED; and

a. Call America is authorized to provide international swtiched voice services by the resale of the international switched voice services set forth in AT&T's Tariff FCC No. 1, MCI's Tariff FCC No. 1 and US Sprint's Tariff FCC No. 1 between the United States and those points listed in those tariffs;

b. CALLUSA is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff FCC No. 1, MCI's Tariff FCC No. 1, US Sprint's Tariff FCC No. 1 and Allnet's Tariff FCC No. 5 between the United States and those points listed in those tariffs;

c. ESI and ALD are authorized to provide international switched voice services by the resale of those international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI's Tariff FCC No. 1 and US Sprint's Tariffs FCC Nos. 1 and 2, between the U.S., Hawaii, Puerto Rico and the U.S. Virgin Islands, on the one hand, and those points listed in those tariffs, on the other hand; and

d. Cleartel is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI's Tariff FCC No. 1, US Sprint's Tariffs FCC Nos. 1 and 2, USTS's Tariff FCC No. 2, Allnet's Tariff FCC No. 5 and C&W's Tariff FCC No. 3 between the United States and those points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203 and Part 61 of the Commission's rules, 47 C.F.R. Part 61, for the services authorized in this order.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for

review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n. 2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB COMMUNICATIONS GROUP, INC. File No. CSG-87-035-P/L

Application for authority to construct and operate an international earth station at Arlington, Virginia, for provision of INTELSAT Business Services

ORDER AND AUTHORIZATION

Adopted: June 30, 1988; Released: July 18, 1988

By the Chief, International Facilities Division:

1. The Commission is considering an application, filed on March 27, 1987, and amended on July 31 and October 21, 1987, by IDB Communications Group, Inc. (IDB), requesting authority, pursuant to Title III of the Communications Act of 1934, as amended, and Section 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities at Arlington, Virginia, for provision of INTELSAT Business Services (IBS). The application was placed on public notice on April 8, 1987. No comments were received. The applicant has been granted authority to establish and operate channels of communication between the U.S. and various overseas points for provision of IBS service.[1]

2. The proposed earth station will consist of a 4.57 meter antenna which conforms with INTELSAT Standard E-2 technical parameters and will communicate with INTELSAT satellites in the 11/14 GHz band in the Atlantic Ocean Region (AOR). The earth station will be constructed at Arlington, Virginia, and will be used to provide a full range of IBS services.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Section 308 and 319 of the Communications Act, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them. [3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

4. IDB's legal, technical, and financial qualifications to construct and operate the proposed earth station are established. IDB has been authorized to construct and operate other IBS earth stations.[5] The proposed earth station conforms with INTELSAT Standard E-2 technical parameters for IBS stations. IDB has completed the necessary frequency coordination.

5. The scope of operation of the proposed station will be the same as that permitted by the Commission in previous IBS authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the stations' digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as a multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

6. Upon consideration of the application, we find that authorization of requested services and facilities is required by the public convenience and necessity.

7. Accordingly, IT IS ORDERED, pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-87-035-P/L IS GRANTED, and IDB is authorized to construct and operate the proposed earth station facilities at Arlington, Virginia, to provide IBS and related digital video services.[6] Before completion of equipment installation and facility activation, however, the applicant shall provide the Commission with a summary of equipment which was actually installed.

8. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* IDB Communications Group, Inc., DA 86-412, released December 31, 1986, (File No. I-T-C-87-013).

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission

will limit the use of the authorized facilities to the provision of IBS/television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] *See* IDB Communications Group, Inc., Mimeo No. 2523, released March 27, 1987, (File No. CSG-87-025-P/L).

[6] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-88-084

Application for authority under the International Maritime Satellite Communications Act and Section 214 of the Communications Act of 1934 to interconnect facilities with MCI International

ORDER AND AUTHORIZATION

Adopted: June 30, 1988; Released: July 18, 1988

By the Chief, International Facilities Division:

1. The captioned uncontested application, filed on February 25, 1988 by Communications Satellite Corporation (Comsat), requests authority pursuant to Sections 503(c) and (g) and 504(c) of the International Maritime Satellite Telecommunications Act (INMARSAT Act) and Section 214 of the Communications Act of 1934, to enter into an agreement with MCI International (MCII) to facilitate the exchange of traffic between ship earth stations served by Comsat and specified offshore and overseas points served by MCII to provide international maritime satellite telephone service via the INMARSAT satellite system and Comsat's Southbury, Connecticut and Santa Paula, California coast earth stations.

2. Upon consideration of the application, we find that authorization of the requested interconnection agreement is required by the public convenience and necessity.

3. Accordingly, IT IS ORDERED that application File No. I-T-C-88-084 IS GRANTED, and Comsat is authorized to enter into an agreement with MCII for the exchange of telephone traffic between ship earth stations using the INMARSAT system and specified offshore and overseas points served by MCII.

4. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-334

In re Applications

62 BROADCASTING, INC.	File No. BPCT-860303KH
AIDA BARRERA	File No. BPCT-860422KN

For Construction Permit
for a New Television Station
Killeen, Texas

Appearances

Joseph E. Dunne, III, on behalf of 62 Broadcasting, Inc.; *Gene A. Bechtel, Shelley Sadowsky*, and *Thomas Schattenfield*, on behalf of Aida Barrera; and *Norman Goldstein*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
JOSEPH CHACHKIN

Issued: June 30, 1988; Released: July 18, 1988

PRELIMINARY STATEMENT

1. This proceeding involves two mutually exclusive commercial applications for a new UHF television station on channel 62, Killeen, Texas. The applicants are 62 Broadcasting Inc. (62 Broadcasting); and Aida Barrera (Barrera).[1] By a *Hearing Designation Order, 62 Broadcasting, Inc., et al.*, MM Mimeo No. 6207, 51 Fed. Reg. 29308 (August 15, 1986), this proceeding was designated for a comparative hearing on the following issues:

> 1. To determine, with respect to each of the applicants, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. *The Hearing Designation Order* also noted that the data submitted by the applicants indicated that there would be a significant difference in the areas and populations served by each applicant. Accordingly, the Commission specified that evidence would be taken under the standard comparative issue concerning the areas and populations served within the Grade B contours of both applicants for the purpose of determining whether a comparative preference should accrue to either one of them.

3. On September 15, 1986 62 Broadcasting filed a "Petition to Enlarge Issues" seeking the addition of site availability and misrepresentation issues against Barrera. In a *Memorandum Opinion and Order*, FCC 86M-3569 (released December 10, 1986) 62 Broadcasting's Motion was granted and the following issues were added:

> 4. To determine whether Aida Barrera had reasonable assurance of the availability of the antenna site specified in her application when it was filed, and, if not, whether Barrera is technically, qualified to be a Commission licensee.
>
> 5. To determine whether Aida Barrera misrepresented facts and/or was lacking in candor in representing to the Commission that she had reasonable assurance of her specified antenna site, and the effect of the evidence adduced thereunder on the basic qualifications of Aida Barrera to be a Commission licensee.

The Presiding Officer ordered that Aida Barrera would bear the burden of proceeding and proof on the added issues.

4. On December 3, 1986, 62 Broadcasting, Inc. submitted an amendment to its application modifying its technical proposal followed on December 11, 1986, with a Motion for Summary Decision requesting favorable resolution of the air hazard issue designated as Issue 1 in the proceeding. Similarly, on December 16, 1986 Barrera filed an amendment modifying her technical proposal, and on December 29, 1986, filed a "Motion for Summary Decision" requesting summary decision with respect to the air hazard issue designated as Issue No. 1. Both motions for summary decision were granted by the Presiding Officer, and the air hazard issues resolved in favor of both applicants. *Order*, FCC 87M-087 (released January 13, 1987).

5. Prehearing conferences were held in this proceeding on October 21, 1986 (Tr. 1-15) and on January 9, 1987 (Tr. 16-62). Another conference was held April 6, 1987 (Tr. 686-710). Hearing Sessions took place on March 23 (Tr. 63-239), March 25 (Tr. 240-449, 499), and March 26 (Tr. 500-685). The record in this proceeding was closed on April 6. *Order*, FCC 87M-770 (released April 8, 1987). Proposed findings of fact and conclusions of law were filed May 28, 1987 by the parties; replies were filed June 25, 1987 by 62 Broadcasting and Barrera.

COMPARATIVE ISSUE

62 BROADCASTING, INC.

6. 62 Broadcasting, Inc. is a qualified Texas for-profit corporation, authorized to issue 2,000 shares of Class A voting stock, and 6,000 shares of Class B nonvoting stock (Barrera Ex. 5, p. 1). 62 Broadcasting, Inc. is the successor applicant to Eula Lea Beck, an individual, who filed the application on March 3, 1986 (Tr. 118). The corporation has three directors and three shareholders: W. Ray Reynolds; Luther Charles Powell; and Eula Lea Beck (Barrera

Ex. 7, p. 1). Only 100 shares of Class A voting stock and 100 shares of Class B nonvoting stock have been issued (62 Broadcasting Exs. 1, 2, 3, p. 1).

7. Eula Lee Beck is the president of 62 Broadcasting, Inc., and owns 51 shares of the 100 shares of the issued Class A voting stock and 70 shares of the 100 shares of the issued Class B nonvoting stock (62 Broadcasting Ex. 1, p. 1; Tr. 132). Mrs. Beck's stock cost100 per share, or12,100 to purchase (Tr. 132). Mrs. Beck's stock in the corporation was purchased using the proceeds of a personal loan from the Lometa State Bank (Tr. 133). The Lometa Bank loan is a personal obligation of Mrs. Beck and the other two shareholders of 62 Broadcasting, Inc., W. Ray Reynolds and Luther C. Powell, who went to the Lometa Bank together and who individually signed on the loan (Tr. 133-135). In addition to the purchase of her stock Mrs. Beck and Messrs. Reynolds and Powell have made personal loans to the corporation (Tr. 146-147). Mrs. Beck decided to organize the applicant corporation by utilizing voting and nonvoting stock in response to advice from her attorneys (Tr. 122). The reason that the corporation was formed with voting and nonvoting stock is "because voting stock is control of the corporation and the nonvoting stock is the financial share of stock that we own . . . " (Tr. 123). 62 Broadcasting, Inc. may issue nonvoting stock later to raise money (*Id.*). At present the corporation's dividends would be distributed share for share depending on each shareholder's percentage of equity shares (Tr. 125-126). Mrs. Beck's stock in 62 Broadcasting is held solely in Mrs. Beck's name, and for her benefit, and is not pledged as a collateral for a loan or any other obligations, or subject to a warrant, option or restriction of any kind (62 Broadcasting Ex. 1, p. 1).

8. Ms. Beck has been married to Bernice (Bernie) M. Beck for over 40 years (62 Broadcasting Ex. 1, p. 2; Tr. 114), and relies on Mr. Beck for her financial support (Tr. 111-112). Mr. Beck is a banker and rancher (*Id.*). Mrs. Beck, in certifying that both she, personally, and then 62 Broadcasting had the financial assets to construct and operate the station was relying on her personal assets; assets in which Mr. Beck has a community property interest (Tr. 117-118). Mr. Beck also has a community property interest in the land on which she originally specified her antenna site (Tr. 117). Mr. Beck on March 26, 1986 signed a "Power of Attorney" vesting in Mrs. Beck a full and universal power of attorney "granting . . . full power and authority to do and perform all and every act . . . " pertaining to the television station on channel 62 in Killeen (Barrera Ex. 9). In a second Power of Attorney signed by Mr. Beck on May 30, 1986, Mr. Beck made his appointment of Mrs. Beck as his attorney with respect to any interest in a potential TV application or station in Killeen, Texas, irrevocable (Barrera Ex. 10). Mrs. Beck, relying on the advice of her Texas counsel, testified that the intent of the Powers of Attorney is the renunciation by Mr. Beck of any of Mr. Beck's community property interest in the TV station application, as well as to ensure that Mr. Beck is not personally liable in the event that Mrs. Beck or the corporation defaults on the loan to the Lometa State Bank (Tr. 135-137).

9. Neither Mrs. Beck, her husband, nor 62 Broadcasting, Inc., own any interest of any kind in any media of mass communications, such as a radio or television station, cable system, MDS system, movie theatre, newspaper, or magazine (62 Broadcasting Ex. 1, p. 1). Mrs. Beck's emancipated daughter, Coleen Beck Beard (62 Broadcasting Ex. 1, p. 2), owns a construction permit for a low power television station in Temple, Texas, which is within the proposed station's service area (Tr. 113).

10. If 62 Broadcasting, Inc. is successful in obtaining construction permit, Mrs. Beck plans to work at the Station as the Station's General Manager a minimum of 40 hours per week (62 Broadcasting Ex. 1, p. 1). As the Station's General Manager, Mrs. Beck would have the overall final responsibility for ensuring that the station is properly functioning. She would be responsible, with the assistance of the various department heads and management staff, such as the station manager and sales manager, for the formulation of overall policy guidelines concerning personnel practices, programming and sales; for the oversight and supervision of all station employees through their immediate supervisors; for the preparation of a budget for the station; for the approval of major purchases of equipment, supplies and programming; for the formulation of policies and procedures for minor purchases of these items; and for the implementation of station's equal employment opportunity program (62 Broadcasting Ex. 1, pp. 1-2). Mrs. Beck will also serve as the station's primary contact with Killeen community leaders, with civic, charitable and fraternal organizations in the service area; and as the station's primary representative at community events and affairs (*Id.* ; 62 Broadcasting Ex. 1, p. 2). As presently planned 62 Broadcasting's proposed management structure would include Mrs. Beck as General Manager, Mr. Powell as Station Manager, and Mr. Reynolds as Sales Manager, (Tr. 139), a chief engineer, a traffic manager, a production manager and a news department under the station manager (Tr. 140).

11. Mrs. Beck was born November 25, 1925 (Tr. 95) and is 61 years old (62 Broadcasting Ex. 1, p. 2). She presently resides at 700 Live Oak Road, Killeen, Texas, an address at which she has lived for approximately 12 years (*Id.*). Mrs. Beck has lived in the city of Killeen itself for over 40 years, and was born and raised in Maxdale, Texas, a small community approximately 15 miles southwest of Killeen (*Id.*).

12. Mrs. Beck first learned the availability of channel 62 in Killeen from her daughter (Tr. 112), who also introduced her to her communications counsel (Tr. 114). When Mrs. Beck first heard about the availability of channel 62 from her daughter she discussed the idea of applying for the station with her husband (Tr. 112). Mrs. Beck decided to go ahead and apply for the frequency because she felt that a television station would be a public service to the community of Killeen (Tr. 113). Mrs. Beck described herself and her husband as "pretty independent people," but could not recall during their over 40 years of marriage an instance in which a major business investment has not involved her husband (Tr. 115). When Mrs. Beck filed the application she was aware that she would receive FCC credit for being a woman as well as for her civic activities (*Id.*). However, except for the initial discussion during which Mr. Beck encouraged her to apply for the station because of her interest in community affairs, Mr. Beck has not been active in any way in the preparation or prosecution of the application (Tr. 116).

13. The initial contact with Mr. Powell and Mr. Reynolds, the other shareholders of 62 Broadcasting, was made by Mr. Beck (Tr. 120) who has known both men for several years (Tr. 121). Mr. Powell and Mr. Reynolds are tenants in Mr. Beck's building (Tr. 121). Mr. Beck also paid the initial1,000 paid in capital to begin the corporate

existence of 62 Broadcasting, Inc. (Tr. 144), because he was at the bank, and Mrs. Beck called him to write the check so the corporation could begin its corporate existence (Tr. 145). Mr. Beck was paid back, however, from corporate funds (Tr. 145).

14. Mrs. Beck is a graduate of Killeen High School, and has 33 credit hours at Central Texas College in Killeen, Texas (62 Broadcasting Ex. 1, p. 2). Mrs. Beck is eligible for the County Librarian Certificate, and has had certified military educational training courses in military correspondence, job instruction, and job relations. Since 1974 Mrs. Beck has served as a volunteer librarian for the Florence Public Library (62 Broadcasting Ex. 1, p. 2). In her capacity as volunteer librarian she has supervised the operation of the library, including interviewing and supervising from two to four employees under the Texas Farmers Union Green Thumb Program, Inc., in addition to students employed by the Williamson County Opportunities Resources Program, which is a CETA program (62 Broadcasting Ex. 1, pp. 2-3). During the summer her activities at the library also involved the supervision of from one to three qualified students from the CETA program (Tr. 109-110). Mrs. Beck also supervises a summer program working in conjunction with the state library system, and chooses books for the library (*Id.*). In her capacity as volunteer librarian Mrs. Beck is also responsible for writing grant proposals, maintaining financial records and records for the state library membership, submitting reports to the city government and ordering new books (62 Broadcasting Ex. 1, p. 3). If 62 Broadcasting, Inc. is awarded a construction permit she will reduce her commitment as a volunteer librarian because she can delegate the work to other board members (Tr. 98). Mrs. Beck will continue to be involved as a consultant after working hours (*Id.*), and has affirmed that she will "cut back quite a bit on that" if 62 Broadcasting were to receive a construction permit (Tr. 110).

15. From 1970 to 1979 Mrs. Beck was employed part-time as a bookkeeper for the Killeen Industrial Foundation of the Greater Killeen Chamber of Commerce. Her previous work experience, dating from 1943, includes jobs as a secretary and supply clerk at the Fort Hood Military Installation, and as a secretary and substitute secretary for schools in the Killeen Independent School District (62 Broadcasting Ex. 1, p. 3). The only employment at which Mrs. Beck has supervised people, however, was in her volunteer position with the Florence Public Library (Tr. 96). Mrs. Beck has never held a managing or supervisory position in a commercial business (Tr. 96-97), but she is the manager of the Florence Public Library on a volunteer basis.

16. During the many years that Mrs. Beck has lived in Killeen and in the service area, she has been active in many community organizations within Killeen and the service area (Tr. 142), particularly in Florence, approximately 22 miles from Killeen (Tr. 142). Mrs. Beck's civic involvement now consumes approximately 30 hours a week (Tr. 148). Mrs. Beck from 1980 to the present has been a member and secretary of the Citizens Advisory Board of the American Educational Complex, Killeen, Texas (62 Broadcasting Ex. 1, p. 3). Her involvement in that activity involves one or two meetings a year plus various called meetings (Tr. 100-101). Mrs. Beck will remain active in this activity should 62 Broadcasting receive a construction permit (*Id.*).

17. From 1978 to the present, Mrs. Beck has been a member of the board of directors of the Killeen Vive Les Arts Societe' and Vive Les Arts Theatre, and was the chairperson of the board from 1983 to 1985 (62 Broadcasting Ex. 1, p. 3). From 1984 to present Mrs. Beck has also been a member of the building committee for a cultural center for the Vive Les Art Societe' (62 Broadcasting 1, p. 3; Tr. 101). Mrs. Beck's present involvement is as an honorary chairman, which includes attending all board meetings, held approximately once a month, as well as different programs throughout the year (Tr. 101). If 62 Broadcasting, Inc. is awarded a construction permit Mrs. Beck will continue her involvement with the Arts committee, but on a reduced level (Tr. 101-102). From 1982 to the present Mrs. Beck has also been a member of the Killeen Independent School District Community Education District Advisory Committee. Mrs. Beck will continue this activity should 62 Broadcasting receive a construction permit but she will delegate some of her duties and hours to her committee members (Tr. 103). From 1986 to the present Mrs. Beck has served as the chairperson for the Community Education for the Killeen Independent School District and Killeen Chamber of Commerce, Partners in Education Adopt-a-School Program (62 Broadcasting Ex. 1, p. 4). As chairperson, Mrs. Beck's duties involve attending an executive meeting once a month and visiting community programs that support funding (Tr. 103). Her involvement with the District Advisory Committee includes attending one meeting a month and interfacing with the community to generate community support for education (Tr. 103). From 1983 to the present Mrs. Beck has also been a member of the Central Texas Library System Council, and has been the secretary since 1985. In 1985 Mrs. Beck was also a member of the Budget Planning Committee of the Council (62 Broadcasting Ex. 1, p. 4). As a member of the Central Texas Library System Council Mrs. Beck attends two membership meetings and at least five workshops a year (Tr. 103-104). Mrs. Beck's term with the Central Texas Library System Council expires next year and she will serve to the end of her term (Tr. 104). Since 1970 Mrs. Beck has been a member of the Killeen Modern Study Club, and from 1986 to the present Mrs. Beck has been the department chairperson for the arts of the Modern Study Club (62 Broadcasting Ex. 1, p. 4), a civic involvement which requires two meetings and one two-hour afternoon program per month (Tr. 104). Mrs. Beck is also serving on the Committee for Finance and Budget and as the secretary/treasurer for the Modern Study Club (Tr. 104-105). In the past she has served on the Yearbook Committee, the Ways and Means Committee, the Project Committee, and the Budget and Finance Committee. Mrs. Beck will continue her activities with the Modern Study Club "to a certain extent" (Tr. 105). The club has an associate membership and Mrs. Beck would serve in that capacity (*Id.*).

18. From 1985 to the present Mrs. Beck served as member of the board of directors and treasurers of the Killeen Area Heritage Association (62 Broadcasting Ex. 1, p. 4), an activity which involves one meeting per month plus general membership meetings and then activities in different areas (Tr. 106). Mrs. Beck also intends to continue that activity to a certain extent should 62 Broadcasting receive a construction permit (*Id.*). Since 1985 Mrs. Beck has assisted in establishing public libraries in Salado, Nolanville, and Kempner, Texas (62 Broadcasting Ex. 1, p. 4), and since 1986 has been the treasurer of the Friends of the Killeen Public Library (*Id.*). Since 1960, Mrs. Beck has

been extensively involved with the Killeen Chamber of Commerce, serving as a member of the Ladies Committee (1960s to present); the College Affairs Committee (1974-1982); the Military Affairs Committee (1982-present); and the Historical Committee (1970s). Her activities with the Chamber of Commerce involve general activities for the military newcomers in Killeen, particularly "the ladies" of military personnel newly assigned to Fort Hood (Tr. 108). The purpose of the Ladies Committee of the Chamber of Commerce includes "interfacing with the general public . . . and promoting the chamber in the membership" (Tr. 109). Activities with the Chamber of Commerce include about two meetings a year plus other involvements (Tr. 109). Mrs. Beck would continue this activity were 62 Broadcasting to receive a construction permit (*Id.*). Since 1974 Mrs. Beck has served as a board member of the Florence Public Library Board of Directors, which is a city appointment, and as the president (1976 to 1982) and treasurer (1980 to present) (*Id.*).

19. Since 1972 Mrs. Beck has been a member of the Florence Chamber of Commerce, and has been a secretary (1983), and a member of the committee planning the Florence civic center building (1985 to present) (62 Broadcasting Ex. 1, p. 5). Her involvement with the Florence Chamber of Commerce includes one meeting a month in the evening, which she will continue if 62 Broadcasting receives a construction permit (Tr. 110). Since 1984 Mrs. Beck has been a sustaining member of the Killeen Junior Service League and one of the two members advising the Junior Service League concerning organizational procedures (62 Broadcasting Ex. 1, p. 5). Her Junior Service League activity involves one meeting at night per month which Mrs. Beck plans to continue (Tr. 111). Since 1985 Mrs. Beck has been a member of the Advisory Board of the Williamson County Literacy Council (62 Broadcasting Ex. 1, p. 5), and Mrs. Beck intends to be involved in that activity until the end of her term in 1987 (Tr. 108).

20. Mrs. Beck plans to maintain an active role in the various community organizations to which she belongs because " . . . I want to continue to be involved because I would like to know the interests and needs of the Community and I want to make sure that I have that interaction to serve the community in the way the television station should . . . " (Tr. 143). Mrs. Beck will curtail her community activities to meet her 40 hour per week commitment to the station, which comes first, before her community activities (Tr. 144, 148). Mrs. Beck plans to spend 40 hours per week working for the station, and her voluntary activities would be in her extra hours after work (Tr. 148-150).

21. Mrs. Beck's present extensive civic involvements are continuation of a history of extensive civic participation in Killeen and the service area, which includes the following:

- From 1985 to 1986, chairperson for the Killeen, Texas Sesquicentennial Committee (city government appointment);

- 1986, assisted in the production of KNCT-TV'S televised literacy program by explaining the resources of the library;

- 1984 to 1986, a member, building committee for the Killeen City Cultural Arts Center;

- 1985, Chairperson, Florence Chamber of Commerce Annual Arts Show;

- 1984-1985, Member, Bell County Historical Commission;

- 1980 to 1984, Member, Central Texas Cultural Foundation;

- 1984, Chairperson, Florence Chamber of Commerce "Miss Friendship" Pageant;

- 1981-1982, Historian (appointed by Killeen City Council), city of Killeen 100th Birthday Centennial commission;

- 1980-1982, Member, Bell County Literacy Council;

- 1980, Assisted in the establishment of Harker Heights Public Library, Harker Heights, Texas;

- 1974-1980, Member and Special Project Director (1980), involved in establishing the library for the American Technological University (DATUM Civic Public Relations Group, American Technological University, Killeen);

- 1975-1979, Charter Member, Community Advisory Board of KNCT, Central Texas College, Killeen, Texas;

- 1970s, Member, Citizen Advisory Board of the American Preparatory Institute, Central Texas College, Killeen, Texas;

- 1978, Auction Chairperson, KNCT, in the Killeen, Harker Heights and Florence area;

- 1975-1976, Chairperson, Program Guide Subcommittee, KNCT, involved in production of KNCT educational children's series "Three to Get Ready" (1976) and involved in KNCT Telecommunications Outreach Committee and production of local history programs for the Killeen, Florence and Gatesville communities (1978);

- 1974-1975, Chairperson (by appointment of Killeen City Council) Heritage Division of the Killeen/Harker Heights Area Bi-Centennial Commission;

- 1974, Organized and established the Florence Public Library;

- 1965-1973, Member, Killeen Garden Club, representative of the Killeen Garden Club to Fort Hood Ecology Committee (1972-1973), third vice president (1968-1970), and chairperson, physical therapy and civic committees (1966-1968), which coordinated and implemented programs for handicapped children;

- 1940s-present, Member, First Baptist Church, Killeen, Texas.

(62 Broadcasting Ex. 1, pp. 5-6).

22. During the 1950s and 1960s when her daughter Colleen was a student in the Killeen public schools Mrs. Beck was also involved in PTA programs as a room mother, and as a group leader of Brownie and Girl Scouts (62 Broadcasting Ex. 1, p. 7). Mrs. Beck was also a member of the Junior and Senior High School Band Boosters Club (*Id.*). In 1983 Mrs. Beck was awarded the "Citizen of the Year" award by the Florence Chamber of Commerce, and in 1980 Mrs. Beck received the

"International Reading Association and Bell County Council Literacy Award" for her services promoting literacy in the county (*Id.*).

23. W. Ray Reynolds is the vice president, secretary and treasurer of 62 Broadcasting, Inc. (62 Broadcasting Ex. 2, p. 1). Mr. Reynolds owns 25 of the 100 issued shares of class A voting stock, and 15 shares of the issued class B nonvoting stock (*Id.*). Mr. Reynolds' stock in 62 Broadcasting, Inc. was purchased from the proceeds of a loan from Lometa State Bank and which he is personally liable to pay back with principal and interest (Tr. 158). Mr. Reynolds is responsible for 20% of all monies that have been paid into 62 Broadcasting, which is 20% of about85,000 (Tr. 157).

24. Mr. Reynolds first became aware of the existence of the Killeen application when Bernie Beck spoke to him and "his partner" Lou Powell in April or early May of 1986 concerning the fact that there was an application for channel 62 in process, which involved Mr. Beck's wife, Mrs. Beck (Tr. 154). Both Messrs. Reynolds and Powell expressed an interest (*Id.*). At that time Mr. Reynolds was acquainted with the Becks and had known Mr. Beck about five years, from Mr. Beck's involvement in the Association of the United States Army (AUSA) while Mr. Reynolds was on active duty with the Army (r. 154-155). Mr. Reynolds is a tenant in Mr. Beck's building and has been for one-and-a-half years, and describes his relationship with Bernie Beck as a friendship, since they see each other about twice a month (Tr. 155).

25. Mr. Reynolds' stock in 62 Broadcasting, Inc. is held solely in his name and for his benefit, and is not pledged as collateral for a loan or other obligation, or subject to any warrant, option or restriction of any kind (62 Broadcasting Ex. 2, p. 1). Neither Mr. Reynolds nor his wife own any interest in media of mass communications such as a radio or television station, cable system, MDS system, movie theater, newspaper or magazine (*Id.*).

26. If 62 Broadcasting, Inc. is awarded a construction permit for channel 62, Mr. Reynolds plans to work at the station a minimum of 40 hours per week as the Station's Sales Manager. As Sales Manager he will be primarily responsible for recruiting and training the sales staff, as well as the public relations or promotion employees; for setting sales goals; planning and implementing sales and promotional campaigns; and the supervision and management of the Station's sales and promotional staff (*Id.*).

27. At present Mr. Reynolds is the president of LYNS Industries, Inc., a services management firm in Killeen, Texas co-owned with Luther C. Powell, which was established in July, 1984 (62 Ex. 2, p. 2). The sort of services that LYNS Industries manages includes catering, some custodial work, and some ammunition damage support testing for the military (Tr. 154). LYNS has also worked with a radio station in Marlin, Texas (Tr. 119). Mr. Reynolds' own commitment to LYNS is a part-time job (62 Broadcasting Ex. 2, p. 2). Since 1978 Mr. Reynolds has been the owner of Reynolds and Associates, and worked as a registered investment broker (*Id.*). Mr. Reynolds has licenses for the sale of insurance and securities, and with Reynolds and Associates is engaged in selling insurance, providing investment advice, and providing financial planning services to a mostly military clientele (62 Broadcasting Ex. 2, p. 2). Mr. Reynolds does his own selling, planning, and marketing without the support or assistance of any other institution or firm (Tr. 153).

28. If 62 Broadcasting, Inc. receives a construction permit, and when it commences constructing the station, Mr. Reynolds plan to curtail his part- time activities with LYNS and turn more and more management responsibilities over to an employee who has been with LYNS since the company's inception (62 Broadcasting Ex. 2, p. 2). During this transition stage, the roughly 10 to 14 months which Mr. Reynolds anticipates the station will require to be constructed, this employee will assume greater management responsibility as Mr. Reynolds devotes less time to LYNS, until he is capable of and actually assumes operation of day-to-day responsibility for managing the business (*Id.*). Following the construction of the station Mr. Reynolds' involvement with LYNS thereafter will be limited to not more than five hours per week, spent largely on weekends, with no day-to-day management responsibilities (*Id.*). Once the station is ready to go on the air, he will, thereafter, be able to devote his full-time and attention to his duties as sales manager (*Id.*).

29. Mr. Reynolds will similarly phase out his involvement with Reynolds and Associates so as not to compromise his commitment to the Station. Mr. Reynolds anticipates devoting not more than two to three hours per week to Reynolds and Associates once the Station goes on the air (62 Broadcasting Ex. 2, pp. 2-3).

30. Mr. Reynolds has a BS Degree in Industrial Arts from Prairie View A & M University, Prairie View, Texas (1958), and an MS Degree in Criminology from the American Technical University, Killeen, Texas (1976) (62 Broadcasting Ex. 2, p. 3). From 1958 through 1978 Mr. Reynolds was an officer in the United States Army, serving as a platoon leader/training officer; an executive officer of a combat support company; as assistant professor of military science, Southern University; and as an assistant information officer (*Id.*). Mr. Reynolds served two tours of duty in Viet Nam, from June 1966 to 1967; and June 1971 to January 1972, as a Senior Advisor to the Republic of Viet Nam (*Id.*). In his capacity as a Senior Advisor Mr. Reynolds was responsible for the civilian and military activities in an entire district of Viet Nam, concerned with the educational, medical, administrative, agricultural and military securities affairs (*Id.*). From July, 1974 through October 1978 he was the chief test and evaluation officer for TACTA, Fort Hood, Texas (62 Broadcasting Ex. 2, p. 3).

31. Reynolds is a Black male, 53 years old, and presently resides at Route 6, Box 78, Killeen, Texas. This address, while a Killeen mailing address, is actually about 8 miles outside the city limits of Killeen (*Id.*). Mr. Reynolds has lived at that address for seven years, and he has lived in Killeen, or on the Fort Hood Military Installation which adjoins Killeen, since July, 1974 (62 Broadcasting Ex. 2, pp. 3-4). Mr. Reynolds is married and has two emancipated sons (62 Broadcasting Ex. 2, p. 4).

32. During the time that he has lived in Killeen and in the service area Mr. Reynolds has been active in several civic, fraternal and community organizations serving Killeen and the service area. All of the activities outlined below took place within the service area of the station; Temple is approximately 22 miles from Killeen (Tr. 160), and Copperas Cove is in Coryell County, 9 miles from Killeen (Tr. 164). Fort Hood abuts Killeen to the west (*Id.*). These activities include the following:

- 1978 to present, Member, National Association for the Advancement of Colored People;

- 1980 to present, Member, Killeen-Fort Hood Chapter of the Association of the United States Army;

- 1980 to present, Member, Killeen chapter, Veterans of Foreign Wars;

- 1984 to present, Member, Killeen Chamber of Commerce;

- 1984 to present, Member, Retired Officers Association, Fort Hood, Texas;

- 1984 to present, Member, Fort Hood/Killeen Chapter, National Contract Management Association (NCMA), Treasurer (1986), Member, NCMA Small Business Fair Planning Committee (1984-1986);

- 1984 to present, Member, Fundraising Committee, Volunteer Fire Department, Hidden Valley Estates, Bell County, Texas;

- 1980 to present, Member, Temple Chapter of the Optimist Club and president (1981), secretary/treasurer (1980), oratorical chairman (1983), youth activities chairman (1984), and club building chairman (1985

(62 Broadcasting Ex. 2, p. 4).

33. Luther C. Powell is the vice president and one of three directors of 62 Broadcasting, Inc. (62 Broadcasting Ex. 3, p. 1). Mr. Powell owns 24 of the 100 shares of issued class A voting common stock and 15 shares of the 100 issued class B shares of nonvoting common stock of the corporation (*Id.*). Mr. Powell is personally liable for slightly less than 20% (19.5%) of the present loan of approximately85,000 from Lometa State Bank to fund the purchase of his stock in 62 Broadcasting, Inc. as well as to meet other applicant expenses (Tr. 159, 169-170). Mr. Powell's stock in 62 Broadcasting, Inc. is held solely in his name and for his benefit, and is not pledged as collateral for any loan or other obligation, subject to a warrant, option or restriction of any kind (62 Broadcasting Ex. 3, p. 1).

34. Neither Mr. Powell nor his wife owns any interest in any media of mass communications of any kind, such as a radio or television station, cable system, MDS system, movie theater, newspaper, or magazine (*Id.*).

35. If 62 Broadcasting, Inc. receives a construction permit for channel 62 Mr. Powell will work at that station as the Station Manager a minimum of 40 hours per week (62 Broadcasting Ex. 3, p. 1). As the Station Manager Mr. Powell will be responsible, under the general manager, for overseeing the day-to-day technical and operational facets of station management (*Id.*). The traffic, programming and engineering staffs would report directly to Mr. Powell (*Id.*). In conjunction with the general manager and program director he would also take part in planning the program production schedule, and evaluating programming for purchase by the station (62 Broadcasting Ex. 3, pp. 1-2).

36. Mr. Powell testified that Bernie Beck first introduced him to the possibility of becoming involved in a channel 62 application when Mr. Beck dropped by the LYNS Industries' office and asked Mr. Reynolds and Mr. Powell if they " . . . were interested in joining Mr. Beck's wife in an application for a construction permit for a television station in Killeen, Texas, and if we were interested he would have Mrs. Beck come by and talk with us about the venture" (Tr. 166). At that time he had known Bernie Beck since the mid 1970's, primarily by being associated with the military, especially through the AUSA, which in Killeen is a big organization (Tr. 166-167). At some time he became what he described as a friend of Bernie Beck and sees him approximately once a month (Tr. 167). When Mr. Powell retired from the Army he became a tenant in Mr. Beck's building (Tr. 168), but he does not receive any special privileges because he is a tenant, and LYNS pays rent the same as other tenants of the building. Mr. Beck also assisted Mr. Reynolds and Mr. Powell by recommending that they obtain financing for their business from the Lometa State Bank, but the bank itself gave Reynolds and Powell the loan (Tr. 168). Mr. Beck has never signed any notes on behalf of Mr. Reynolds or Mr. Powell (Tr. 168-169).

37. Following the initial conversation in which Mr. Beck asked Mr. Powell if he were interested in talking to Mrs. Beck about a TV venture, Mr. Beck has never been present at any meetings which involved the TV venture (Tr. 170), and has never taken part in any directors or other meetings of 62 Broadcasting (Tr. 170-171). To the best of Mr. Powell's knowledge Mr. Beck has never spoken with any of 62 Broadcasting's engineering or legal consultants, nor to Mr. Powell's knowledge has Mr. Beck been involved in any of 62 Broadcasting's business in any way (Tr. 171).

38. Mr. Powell has a BS Degree in English Education from Southern University (1961), and an MA Degree in Mass Communications (Broadcasting) from Marshall University (1974) (62 Broadcasting Ex. 3, p. 2). Mr. Powell and Mr. Reynolds have also attended broadcast meetings and seminars (Tr. 119). Since 1984 Mr. Powell has been the co-owner (with Ray Reynolds) and general manager of LYNS Industries, Inc., Killeen, Texas (*Id.*). If 62 Broadcasting, Inc. is awarded a construction permit Mr. Powell will gradually lessen his day-to-day involvement in the management of LYNS Industries until the station is ready to commence operation (*Id.*). The responsibility for managing LYNS will gradually be assumed by the Company's present operations manager who has been with the company since the company began operating, and who is intimately familiar with LYNS' business (*Id.*). Because of the operations manager's familiarity with the business, Mr. Powell believes that the transition time of 10 to 14 months, while the station is being constructed, should be ample to train this employee to assume full operational responsibility for managing the LYNS business. Once the station commences operation and Mr. Powell commences his full-time involvement in station management as the station manager, he will no longer have any day-to-day management duties with LYNS, and will devote no more than five hours per week, spent largely on weekends, to LYNS Business.

39. Prior to his involvement in LYNS Industries Mr. Powell served 22 years as a officer in the United States Army (62 Broadcasting Ex. 3, p. 3). Mr. Powell served two terms of duty in Viet Nam, and as Deputy Post Commander for Camp Red Cloud, Department of Korea (May, 1980-June, 1981) (*Id.*). During his tour of duty in Viet Nam, from July 1969 through July 1970, he served as Public Affairs Officer for IV Corps. In that capacity he was responsible for supervising and managing all media related activities in the Delta region of Viet Nam, including maintaining the press camp and providing press briefings for all U.S. and accredited press representatives (*Id.*). His responsibilities also included managing the U.S.

Army Newspaper published in the region, and managing the U.S./Republic of View Nam television translator station located in the area (*Id.*). This translator, which was operated on channel 72 by a staff of three, rebroadcast programs from an American television station located in Saigon (*Id.*). The translator station did not originate programming, and Mr. Powell's duties included overseeing the technical operation of the translator (Tr. 166). He also attended weekly meetings with representatives with the American Channel in Saigon, at which time past and prospective programming broadcast on the station would be discussed (62 Broadcasting Ex. 3, p. 3). During his Army career Mr. Powell also served as director of housing, Fort Hood, July, 1981 to July 1984, and as a test officer and public affairs officer for TACTA at Fort Hood, Texas (August 1974-May, 1978).

40. Mr. Powell is a Black male, 46 years old, and presently lives at 406 Jeffrey Lane, Copperas Cove, Texas (62 Broadcasting Ex. 3, p. 3). Copperas Cove is a community approximately nine miles west of the city limits of Killeen (62 Broadcasting Ex. 3, pp. 3-4), in Coryell Country (Tr. 164). Mr. Powell has lived in Copperas Cove since his assignment to Fort Hood in August, 1974, excluding the year he spent overseas in Korea (*Id.*). During that time period Mr. Powell has been active in a number of community, civic, charitable and fraternal organizations within the service area, which are listed below:

- 1984 to present, Member, Killeen Chamber of Commerce;

- 1986 to present, Member, Coryell County Grand Jury;

- 1984 to present, Charter Member of the Board of Directors, Copperas Cove Crime Stoppers, Inc., Copperas Cove, Texas:

- 1983 to present, President, Parish Council of the 76th Street Chapel, Fort Hood, Texas;

- 1984 to present, Director, Annual Black History Pageant, Killeen-Fort Hood, Texas;

- 1984 to present, Member, Retired Officers Association, Fort Hood Chapter, Killeen, Texas;

- 1977 to present, Member, Exchange Club of Copperas Cove, Texas, Member, Exchange Club Board of Directors (1980-1983); Chairman, Scholarship Committee of the Exchange Club (1980); Chairman, Crime Prevention Committee of the Exchange Club (1982-present); honored as the Exchangite of the Quarter (4th quarter, 1980);

- 1980 to present, Member, Planning and Zoning Commission, Copperas Cove, Texas;

- 1984 to 1986, Member, National Association for the Advancement of Colored People;

- 1984 to 1986, Member, Fort Hood-Killeen Chapter, National Contract Management Association (NCMA);

- 1983-1985, Co-chairman, Copperas Cove Chapter of the Citywide Neighborhood Crime Watch Committee.

(62 Broadcasting Ex. 3, pp. 4-5).

AIDA BARRERA

41. Aida Barrera is an individual applicant for a new television station to operate on channel 62 in Killeen, Texas (Barrera Ex. 1, p. 1). Mrs. Barrera was born on December 25, 1935 (Tr. 191), making her 51 years old. She is a Mexican-American female born in Rio Grande City, Texas (Barrera Ex. 1, p. 2). Mrs. Barrera's current address, which she has maintained since 1976, is 1090 Spicewood Parkway, Austin, Texas (Barrera Ex. 1, p. 1). Austin is approximately 65 miles from Killeen, or about one hour's driving time (Tr. 189). Ms. Barrera actually lives in Jolleyville, Texas, a suburb of Austin, which is approximately 15 miles from Austin (Barrera Ex. 1, p. 1). Jolleyville is in Williamson County, which is adjacent to the Travis County line, in which Austin is located (Tr. 190). Ms. Barrera is not planning to move to Killeen (Barrera Ex. 1, p. 2). Ms. Barrera has resided in Austin, within the service area, at other addresses, since 1955 (Barrera Ex. 1, p. 2).

42. Barrera earned a Bachelor of Journalism Degree from the University of Texas, Austin, in 1957 (*Id.*). She studied comparative literature as a graduate student at the University of Texas, Austin, from 1963 to 1969. From 1974 to 1978 she was a guest professor at the University of Texas, Austin, with a job appointment in the Department of American Studies in the Department of Radio-TV film (Barrera Ex. 1, pp. 2-3). In 1984-1985 Ms. Barrera was a fellow at the Woodrow Wilson School of Public and International Affairs at Princeton University, Princeton, New Jersey, and since returning to Texas she has continued part-time studies at the Lyndon Baines Johnson School of Public Affairs at the University of Texas, Austin (*Id.*).

43. Barrera began her "television career" in 1962 when she won a job as an on-camera spanish language teacher for the PBS station in Austin, KLRN- TV, Channel 9 (Barrera Ex. 1, p. 3). As the on-camera spanish teacher Ms. Barrera taught six courses, one each for grades 1 through 6 (Barrera Ex. 1, p. 4). Ms. Barrera went on to produce a television program, "Carrascolendas," a bilingual television series which was produced for six seasons (Barrera Ex. 1, 5). In her capacity as producer Ms. Barrera hired everyone, oversaw the budget, wrote the scripts and invented all the characters that acted on camera (*Id.*), and throughout served as executive producer of the program (Barrera Ex. 1, p. 6).

44. Although it was in production for only six years, "Carrascolendas" is still being broadcast by public television stations as well as commercial television stations and cable systems, even though program production ceased in 1976 (Barrera Ex. 1, p. 6). The program won numerous awards, including: Action for Children's Television, Achievement in Television, 1974; the Prix Jeunesse Festival in Munich, Germany, 1974, selected by PBS to represent the United States; Gold Award, National Association of Educational Broadcasters, 1974; Gold Award, New York International Film Festival, 1974; First Award, Instructional Design, Southern Educational Communications Association, 1973; National Finalist, Community Service Emmy, National Academy for Television Arts and Sciences, 1973; Silver Hugo, Chicago International Film Festival, 1973; Exceptional Achievement, Corporation for Public Broadcasting, 1972 (Barrera Ex. 1, p. 7). The program also received the UNICEF prize at the Japan Prize Festival in Tokyo in 1973.

45. In 1973 Ms. Barrera assumed the position as Vice President for Special Projects at KLRN, Austin, Texas, a position which she held until she left the station in January, 1977. After leaving KLRN Ms Barrera founded and became the president of the nonprofit educational production company, the Southwest Center for Educational Television, centered in Austin, Texas, which was supported by grants from the National Endowment for the Humanities, the Gannett Foundation and others (Barrera Ex. 1, p. 8). In 1979 the Southwest Center for Educational Television started production of the series, "Checking It Out," a bi-lingual television documentary service for teenagers, which was distributed by PBS in 1982 and 1983 (Barrera Ex. 1, p. 8-9/ "Checking It Out" consisted of 26 half-hour documentary programs on topics of interest to teenagers.

46. Ms. Barrera was the executive producer and often a field producer of "Checking It Out," with duties as Executive Producer which were similar to those described for "Carrascolendas."

47. During 1982 and 1983 Ms. Barrera was the executive producer for two radio program series, an audio version of "Checking It Out" which was broadcast by National Public Radio (NPR), and "Sabor Del Pueblo," a series on Mexican-American culture which was also broadcast on NPR (Barrera Ex. 1, pp. 10-11). Ms. Barrera also conceived of a television series featuring members of American Ethnic Groups, and produced and served as Executive Producer of "Somebody Else's Place," a 12-part half-hour series documenting the experiences of teenagers in different ethnic groups as they lived with each other (Barrera Ex. 1, pp. 11, 13). The program was shown nationally on PBS in 1986 and won the Gold Award at the New York International Film Festival in 1983 (*Id.*).

48. The Southwest Center for Educational Television has produced a documentary film about Pueblo Indians in New Mexico, entitled "The End of The Race," the details of which were handled by others at the Southwest Center for Educational Television (Barrera Ex. 1, p. 13-14).

49. Since 1977 Mrs. Barrera has also engaged in independent script writing for television, including scripts for the following: "Mundo Real," a bi-lingual television series produced by Connecticut Public Television, Hartford, 1977-1978; "Infinity Factory," a math education program produced by the Educational Development Center, Boston, Massachusetts; "Footsteps," a program on parenting produced by Educational Film Center, Springfield, Virginia, 1977; "Watch Your Mouth," a story and script ideas for program and language education for WNET-TV, New York, New York, 1977-1978; "A Girl Named Linda and Mexican Greaser," scripts on epilepsy and racial prejudice for a multi-cultural teen series entitled "The New Voice," produced by WGBH-TV, Boston, Massachusetts, 1979; "New Horizons, Hispanic Heritage," program script for Austin Independent School District (in conjunction with the Cinco de Mayo celebration), 1986. These scripts were scripts for which she received renumeration and are professional activity (Tr. 203).

50. Since 1977 Ms. Barrera has worked as a consultant and lecturer in media related matters, including the following projects: media consultant on foreign policy related subjects for the Foreign Policy Association, New York, 1985; consultant on status of hispanics in the media for the New York Times, 1985; speaking engagement and class seminar, "Television Production Techniques," and "Media Sterotypes," Miami-Dade Community College, Distinguished Visiting Professors Series, 1983; speaker on minorities and the media for the World Congress of Mental Health, Washington, D.C., 1983; speaking engagement and professional class seminar as guest professor of telecommunications, Syracuse University, 1981.

51. Ms. Barrera has also been on a special mission to Caracas, Venezuela, for development of television and other technological potential for the Ministerio De Education, sponsored by UNESCO, 1978; been a production consultant and member of the advisory board for "Free Style," a career awareness television program produced by station KCET, Los Angeles, California, 1977; served as a media consultant for the Los Angeles County Schools, Downey, California, 1977; and served as a program production consultant to Agency for Instructional Television, Bloomington, Indiana, 1977 (Barrera Ex. 1, p. 15). Ms. Barrera also has participated as a member of the White House Commission on Presidential Scholars, appointed by President Ford, 1977, the Rockefeller Commission on the Humanities (including service on the committee on education concerning humanities through the use of media), 1978-1980; and the board of directors of the National Council on Foreign Language and International Studies, 1980 to present (Barrera Ex. 1, pp. 15-16). Ms. Barrera's activity with the White House Commission on Presidential Scholars had nothing to do with Austin, Killeen or the service area (Tr. 210), and was described by Ms. Barrera as " . . . so brief, to be perfectly honest, that there was hardly any chance to do anything" (Tr. 211). Ms. Barrera's activity with the Rockefeller Commission on Humanities was a two year involvement that did investigations throughout the country "as well as in our area" (Tr. 211). The National Council of Foreign Languages and International Studies is a national organization, with no regional selection process and no meetings or activities within the service area (Tr. 212-213). All meetings of the National Council take place in New York (*Id.*). The Rockefeller Commission on the Humanities met throughout the country, but only one meeting a year would be held in Austin, and that because the Executive Director was from Austin (Tr. 213).

52. Ms. Barrera has also been a participant in conferences and forums sponsored by the Action for Children's Television to promote community action towards the betterment of children's television and related advertising, 1974- 1984; a member of the steering committee, KIDSNET, a national clearing house for children's radio and television programs, Washington, D.C., 1984 to present; a member of the five person search committee for the Corporation of Public Broadcasting (CPB) to appoint a new national program fund director; a member of the Public Broadcasting Service Satellite Interconnection Committee, which works at the behest of the PBS board that makes technological and economic decisions on the use of satellites for public television, 1983 to present; designated (February, 1987), a representative for the Corporation for Public Broadcasting (CPB), to attend INPUT, an international television festival to be held in Spain in April, 1987, and a participant in various other committees and assignments for the Corporation for Public Broadcasting (CPB), the Public Broadcasting Service (PBS), and the National Public Radio (NPR), including subject matters of evaluation of children's programming, Latinos in media, women in broadcasting, 1971 to present (Barrera Ex. 1, pp. 16-17). Meetings of Action for Children's Television normally take place in Washington, and Action for Children's Television is a national organization which relates

to children throughout the country and has no particular focus on Austin or the service area (Tr. 214). The steering committee for KIDSNET is a Washington, D.C. organization (Tr. 214). Neither KIDSNET, nor Action for Children's Television has a specific chapter in the Austin area (Tr. 215). The search committee for the Corporation for Public Broadcasting has no chapter in Austin or the service area, nor does it have any focus on Austin or the service area (Tr. 215). All meetings of the Corporation for Public Broadcasting are held in Washington (Tr. 216). All meetings of the Public Broadcasting Service are in Washington, and there is no local chapter or office of the committee in Austin (Tr. 216).

53. In 1977 Ms. Barrera was a member of the Austin advisory committee for the Texas Commission on Arts and Humanities (Barrera Ex. 1, p. 17). The Austin Advisory Committee reviewed grants to individuals, and met several times a year (Tr. 218). Attending meetings was Ms. Barrera's only activity with respect to the Austin Advisory Committee (*Id.*). Ms. Barrera has been a volunteer speaker in area schools as a part of career awareness and cultural programs, perhaps six times over the last 10 years (Barrera Ex. 1, p. 17). As a voluntary speaker Ms. Barrera was not a part of or affiliated with any particular organization (Tr. 219). From 1976 to 1979 Ms. Barrera was a member of the Austin Alliance for a Smooth Transition, which assisted Austin in overcoming racial difficulties because of the court-ordered bussing (Barrera Ex. 1, p. 17). Ms. Barrera was, however, neither an officer or director of the organization, simply a member (Tr. 218). Ms. Barrera also "worked to increase participation of Hispanic women in voting, approximately 1985 to date" (Barrera Ex. 1, p. 18), but she is not part of any formal organization to increase the involvement of Hispanic men and women in voting, and she cannot specify how much time she has devoted to that activity, because "at this point it is at an informal level" (Tr. 220). There is no formal organization, no plans have been implemented to increase Hispanic participation in the electoral process, and nothing was done during the last election to increase Hispanic voter registration (Tr. 221-222). In 1986 Ms. Barrera served as a member of the Austin area committee to elect Roy Barrera Attorney General of Texas (Barrera Ex. 1, p. 18). Ms. Barrera is also currently sponsored by Austin's RGK Foundation for "Leadership Texas," a project of the Austin, Texas Foundation for Women's Resources. This project brings together women from throughout the state for Leadership Meetings and training, and in 1985 Ms. Barrera was approximately one of eight nominees in the Austin area for the election to a Texas Women Hall of Fame, an activity administered by the State Commission on Women (Barrera Ex. 1, p. 18). None of Ms. Barrera's civic activities has any nexus to Killeen or to Bell County, in which Killeen is located. Ms. Barrera's only connection to Killeen prior to filing her application was having "gone through the area . . . visited in the area" (Tr. 195).

54. Ms. Barrera plans to work full-time, a minimum of 40 hours per week, as the General Manager of the Killeen television station. In that capacity she will be responsible for establishing all station policies and overseeing their implementation by the staff on a day-to-day basis. To that end, all supervisory employees, *e. g.*, program director, sales director, promotions director, chief engineer, will report directly to Ms. Barrera (Barrera Ex. 1, pp. 18-19), who will also attend to the station's equal employment practices program (Barrera Ex. 1, p. 18). To carry out these commitments Ms. Barrera intends to terminate her connection with the Southwest Center for Educational Television and any other employment or time consuming appointments and consultancies which she may have at the time the application is granted (Barrera Ex. 1, p. 19). Ms. Barrera will not perform as talent in any production (Tr. 201), and testified that there will be 15 employees at the station (*Id.*).

55. Ms. Barrera has been married fifteen years to Dr. Frederick Close. (Tr. 195, 202; Barrera Ex. 1, p. 19). Ms. Barrera has put her own personal funds into the application, but the funds are drawn on a joint checking account that she has in Austin with her husband (Tr. 202). The bank letter which Ms. Barrera received to fund the construction and operation of her station was received from a bank of which she and her husband have been a customer for some years (*Id.*).

56. Neither Ms. Barrera nor any member of her immediate family has any ownership interest in any radio or television station, movie theater, MDS System or LPTV station. Both she and her husband, Dr. Frederic Close, are officers and directors of the Southwest Center for Educational Television, Inc. (Southwest Center), a non-profit corporation which has produced educational programs for television and radio (Barrera Ex. 1, p. 19). The Southwest Center does not own or operate any television or radio stations (*Id.*). There are no programs presently in production by the Southwest Center (Tr. 196), but Ms. Barrera has submitted a proposal to a foundation for funding for the Southwest Center (Tr. 198). At present Ms. Barrera has no funding proposal in the works to submit to any agency, and the foundation grant which she has submitted is now over a year old (Tr. 198-199). The grant proposal which she did submit is for initial seed money for a program that would subsequently need a further grant for production funds (Tr. 200).

COMPARATIVE COVERAGE

57. The total areas and population which the applicants will cover, the uncommon areas and populations served within the proposed Grade B contour, and the availability of other services is set forth in the following tables:

TABULATION OF POPULATIONS AND AREAS

POPULATIONS

SERVICE	62 Broadcasting, Inc.	Aida Barrera
Grade B	824,322	879,511[2]
Zero TV Service Area	3,408	0
One TV Service Area	810	0
Two TV Service Area	3,040	0
Three TV Service Area	2,272	1,794
Four TV Service Area	3,807	4,907[3]
Five or More TV Service Area	5,650	71,570[4]

AREAS

SERVICE	62 Broadcasting, Inc.	Aida Barrera
Grade B	12,931	13,558[5]
Zero TV Service Area	574	0
One TV Service Area	172	0
Two TV Service Area	966	0
Three TV Service Area	433	27
Four TV Service Area	130	474

AIDA BARRERA

ANTENNA SITE & SITE MISREPRESENTATION ISSUES 4, 5

58. Aida Barrera filed her application for Channel 62 in Killeen, Texas on the cut-off date, April 22, 1986 (Tr. 312). The antenna site specified by Aida Barrera was on the tower of KIXS-FM, Killeen, Texas located in Bertram, Texas (Tr. 400). At the time the application was filed KIXS-FM was owned by Grace Broadcasting, Inc. (Tr. 571), and was subsequently sold in December, 1986 (Tr. 632-633). At the time of the events in question, the President of Grace Broadcasting, Inc. was Michael LaRieux (Tr. 573); the Vice President was John Smith (Tr. 571, 639); the Vice President and Director of Engineering was Gerald C. Vander Sloot (Tr. 572, 632); and the General Manager of KIXS-FM was Douglas C. Raab (Tr. 592, 676).

59. Before KIXS-FM was purchased by Grace Broadcasting Company in January, 1986 (Tr. 571, 633), the station was owned by City Media (Tr. 573). Long before the actual purchase of the station, during the NAB in 1985, Grace Broadcasting, Inc. and City Media were negotiating for the sale of the station, and Gerald C. Vander Sloot was negotiating with Stainless, Inc., a tower erector company, concerning the construction of a new tower for the station (Tr. 635, 677). At that time a study had been done by a private entrepreneur who had hoped to build the tower and to lease space to KIXS and other communications entities in the area as a financial investment (Tr. 652). After considerable research the outside investor determined that there was no radio or TV station interested in leasing space on the proposed tower (Tr. 652). Grace therefore decided to build the tower only to accommodate a top-mounted antenna for KIXS-FM, a communications platform for two-way radio antenna at approximately 1000 feet, and an STL and small communications antenna from 300 to 700 feet primarily to be used in connection with the KIXS operation (Tr. 652-653).

60. When Grace Broadcasting, Inc. assumed ownership of KIXS-FM in January, 1986, it hired John P. Smith as a vice president of the corporation (Tr. 571), and his responsibilities were made clear to him. Smith was an owner of City Media, the former owner of the station (Tr. 573), and his responsibilities were for a "dirt construction" (Tr. 572), or to do the "ground work" (Tr. 634). It was his responsibility to oversee the lease of the land for the antenna site; supervise the deliveries of materials to the site; to communicate with the lessor of the property on which the site was to be located; to ensure that the geotechnical and ground survey work was completed; and to handle any other on-side responsibilities (Tr. 572, 634). Gerald C. Vander Sloot, the Vice President and Director of Engineering of Grace Broadcasting, Inc., was to handle all other details of tower construction, including negotiating with the tower erector; dealing with any technical issues concerning the tower; and most importantly, dealing with any inquiries concerning tenants on the tower (Tr. 578, 581). Smith's instructions were to refer all inquiries concerning possible tower tenants to Vander Sloot (Tr. 578-579).

61. Aida Barrera began the application process when she hired Gene Bechtel of Bechtel & Cole as her communications counsel in early April, 1986. Bechtel called Ms. Barrera on April 7 (Tr. 503), had two conversations with her on April 10, and actually met Ms. Barrera in her home in Austin on April 13 (Tr. 564). In one of their first phone conversations Ms. Barrera and Bechtel discussed the necessity for an antenna site. Following this conversation, on April 7, 1986, Bechtel called a former client, Richard C. Moore, to ask if he knew of any towers that might be available in the Killeen area (Tr. 503). Moore informed Bechtel that a tall tower was in the process of being built in Bertram, Texas, and that he should speak with the owners of the station, KIXS, to determine if there was space on the tower (*Id.*). Bechtel was told by Moore that John Smith was the person to contact (*Id.*). Moore gave Bechtel John Smith's telephone number (Tr. 506; Barrera Ex. 16). Following this telephone conversation Bechtel called Ms. Barrera and informed her of the location of the tower and gave her the name of John Smith and the telephone number and asked her to contact him to secure access to the tower (Tr. 396, 446, 503). This was the first and only antenna site that Bechtel ever suggested to Ms. Barrera (Tr. 458), and was the only one that Aida Barrera was to study before her application was filed. Sometime during that period Ms. Barrera learned of the possibility of locating on another tower, the KNCT-FM tower south of Killeen (Tr. 447, 458). She called another party, Noel Smith, to determine if that tower, which she believed was about 400 feet tall, was available. Ms. Barrera discovered that the KNCT tower no longer existed (*Id.*). From that time until the end of April, 1986, neither Ms. Barrera nor any of her consultants studied any other possible broadcast tower or antenna site with respect to Ms. Barrera's application (Tr. 280, 458, 523, 560-561). Ms. Barrera was aware of and had spoken with her attorneys about the cost advantage of renting space on an existing tower rather than paying to construct a tower (Tr. 453), and that using an existing tower would not require FAA clearance.

62. Ms. Barrera, some time before the NAB (which occurred between April 12 through 16, 1986) tried to call John Smith (Tr. 396) and he returned her call (Tr. 574). During that conversation Ms. Barrera essentially asked if she could use the KIXS antenna site for her Channel 62 TV application (Tr. 397). Ms. Barrera testified that Smith told her that "he didn't think it was a possibility because other people had approached them to rent space on the tower and they had been turned down . . . " (*Id.*) Smith indicated they had never been approached by a TV station and that owners of the station and the engineers were coming to Texas for the NAB and she should discuss it with them (*Id.*). Ms. Barrera believes that Smith specifically mentioned that Vander Sloot would be at the NAB (Tr. 440-441). Ms. Barrera's notes of that conversation are Barrera Exhibit 14, and based on those notes Ms. Barrera testified that she and Smith spoke about the new tower, the fact that the tower was approximately 2000 feet tall, and located half-way between Killeen and Austin, that the tower was off Interstate 35, and that it was located in Bertram-Liberty, Texas (Tr. 400-404; Barrera Ex. 14). John Smith kept no notes of this or any other conversa-

tion (Tr. 576). He testified that he and Ms. Barrera "chit-chatted" about several subjects, but that he told Ms. Barrera that she would have to talk to Mr. Vander Sloot, that "he was the person that she would have to talk to," and that he was getting ready to go to the NAB (Tr. 574). Smith recalls that he gave Barrera Vander Sloot's telephone number in Grand Rapids and told her that Vander Sloot was going to the NAB to negotiate the contract for the tower (Tr. 574, 587). Barrera told him that "she was in a hurry because she had to get moving on her situation" (*Id.*). When Ms. Barrera spoke to Smith, he had been informed by Mr. Vander Sloot that Grace Broadcasting didn't want tenants on the tower because they weren't going to have space on the tower (Tr. 577), and Smith told this to Ms. Barrera during their first telephone conversation (Tr. 577). Smith told her that Grace was not actively soliciting tenants for the tower (*Id.*).

63. Following her conversation with Smith, Barrera met in Austin with her counsel, Gene Bechtel, and Kevin Fisher, an engineer with Smith & Powstenko before the NAB Convention (Tr. 404, 564). They discussed the possibility of using the KIXS tower and it was concluded that the KIXS tower would be a suitable location and efforts should be made to obtain permission to use the tower (Tr. 405, 451-458). Bechtel testified that he met with Kevin Fisher both at the NAB and while he was preparing to go to Austin to meet Ms. Barrera (Tr. 548). At that time he discussed with Fisher "whether the tower could support their antenna" (Tr. 548-549). Fisher was using a computer to access data about the tower but Bechtel wasn't sure of the sort of data Fisher was accessing; whether it could have been information concerning allocation constraints and channel spacings rather than technical information concerning the tower (Tr. 549). Bechtel testified that at that time Fisher had the FCC file on the application, but did not know then, or ever, if Smith and Powstenko ever obtained any other information about the tower, such as a structural analysis, specifications, or information of that sort (*Id.*). Bechtel was "not aware of any of that information" (*Id.*). Bechtel's conversation with Fisher on April 13 was the only conversation that he had with the engineers during which the structural integrity of the tower was discussed before the application was filed (Tr. 548).

64. Gerry Vander Sloot attended the NAB Convention (Tr. 635). Although Smith and Vander Sloot met once or twice at the convention, they were "both going in different directions all the time," and Smith does not recall mentioning Aida Barrera or her request for antenna space to Vander Sloot (Tr. 575). At that convention Vander Sloot completed negotiating the final details of the KIXS tower construction project with Stainless, Inc., the tower erector (Tr. 635-636). For over a year Vander Sloot had been discussing tower prices and costs, and by that time had succeeded in "shaving everything off the tower but our own needs, with the exception of a communications platform at 1,000 feet and possibly some other small antennas mounted at 400 feet" (Tr. 638-639). When Vander Sloot returned home from the NAB on April 16, all essential details concerning tower construction had been negotiated, and all that was necessary was final approval by each company's respective corporate counsel (Tr. 636). He had, at that time, a letter from Stainless fully describing the tower, which he could have provided to anyone who requested it (Tr. 643). The specifications for the tower included provisions for one FM antenna to be top mounted; one FM antenna to be side-mounted at 1250 feet; one four and one five inch transmission line to each antenna; 12 two-way radio antennas to be mounted between four and six hundred feet; four grid antennas; transmission lines to the two-way antennas; and one communications platform at 1000 feet level. The specifications were quite specific concerning the tower's windloading capacity (62 Broadcasting Ex. 4, pp. 1-2).

65. When he returned from the NAB John Smith received another call from Aida Barrera on either April 16 or April 17 (Tr. 407). According to Ms. Barrera's notes of the conversation, she and Smith chatted about various topics, including the fact that a KIXS-FM is going to be a "rocker" station for its format, and the FAA had turned down various KIXS proposals for tall towers at least three times (Tr. 410-412). Ms. Barrera also testified when she asked concerning the availability of the KIXS tower, Smith told her that he had a "preliminary yes from Jerry," "Jerry" being Gerry Vander Sloot, Grace Broadcasting's Vice President of Engineering (Tr. 412). Ms. Barrera believes he used those exact words "because my tendency when I am scribbling notes like this is to write the actual words that the person said" (Tr. 428-429). Barrera said that she was told that Vander Sloot was the person "technically responsible," and that "the engineers would have to look at this and give their approval and that this could be done if the engineer said it was all right" (Tr. 429). Smith does not recall telling Barrera anything to the effect that he had a "preliminary yes" from Vander Sloot or anyone else (Tr. 576-577). According to Smith's testimony, when Ms. Barrera asked again about the availability of the KIXS tower he told her that "she would have to talk to Gerry Vander Sloot, that I was not the person to talk to" (Tr. 576). Smith recalls that Barrera told him that she was in a hurry, and he reiterated that she needed "to talk to Gerry because he is the person to talk to" (*Id.*). Ms. Barrera was asked to explain her testimony in light of her "Declaration" appended to Barrera's October 7, 1986 opposition to 62 Broadcasting, Inc.'s Petition to Enlarge Issues, in which Ms. Barrera averred that Smith told her "that he was not the person responsible for handling the matter. She would have to speak with Gerry Vander Sloot, the chief engineer who was with Grace Broadcasting headquarters in Michigan." When confronted with this Declaration Ms. Barrera equivocated in her account. At first Ms. Barrera testified that Smith told her to call Vander Sloot about the "technical details" (Tr. 430), but when she was referred to her Declaration in which no mention was made of any "technical details," Ms. Barrera testified that " . . . [h]e (Smith) did tell me he was responsible for negotiations and he did say to me that, that the negotiations of that lease arrangement, the final lease agreement, I guess, were to be handled by Vander Sloot" (Tr. 432). Ms. Barrera testified that after that telephone call to John Smith, Gene Bechtel and Neil Smith were "to handle negotiations" (Tr. 432), and "to seek permission" from "Grace Broadcasting" or "whoever was to be responsible, whether it was Gerry Vander Sloot . . . or anybody" (Tr. 433). Ms. Barrera affirmed that her instructions to her counsel and engineer were to negotiate with Vander Sloot on her behalf (Tr. 433), and that any continuing negotiations were to be with Vander Sloot (Tr. 435). Barrera testified however, that after her conversation with John Smith, "I understand that to be the permission that I needed to be on the tower" (Tr. 436). Barrera further testified that the "reasonable assurance" she had concerning her antenna site came from her conversation with Smith, as well as Bechtel's subsequent conversations with

Smith and Vander Sloot, and Neil Smith's conversation with Vander Sloot (Tr. 444-445). Ms. Barrera knew what reasonable assurance meant from conversations with her attorneys. "Well, I knew it [reasonable assurance] was the permission that you obtained from someone to either construct a tower on their property or get permission to rent space on a tower . . . " (Tr. 439).

66. Smith does not recall apprising Vander Sloot of Aida Barrera's interest in the KIXS antenna site at the NAB (Tr. 575), nor does he recall mentioning Ms. Barrera's inquiry to Gerry Vander Sloot in April of 1986 (Tr. 583, 590). Vander Sloot's recollection concerning whether he discussed Aida Barrera's proposal with Smith in April, 1986 is contradictory. Vander Sloot testified variously that he did not recall any such conversations (Tr. 659), and certainly couldn't recall the specifics of any such conversations (Tr. 663). When reflecting that when Neil Smith mentioned Barrera's name he wasn't surprised, so "he assumed" he heard the name from John Smith (Tr. 663-664), since he was speaking with John Smith about the tower project on a regular basis (Tr. 663). Vander Sloot then affirmed his deposition testimony in which he described a conversation with John Smith in which Smith told him there was a party interested in the tower, and Vander Sloot testified that he said "that's fine, but at that particular time I replied that it is the 11th hour and I am afraid we couldn't entertain such thoughts" (Tr. 667-668).

67. Very soon thereafter, and independently of Ms. Barrera, John Smith was called by Bechtel, while Bechtel was waiting for a plane at the Dallas Airport returning from the NAB (Tr. 504). The telephone conversation with Smith was very short, of only five minutes in duration (Stipulation Tr. 509). Bechtel testified that in that conversation he asked Smith whether Aida Barrera could specify the KIXS tower as her antenna site, subject to agreement concerning reasonable lease terms, etc. (Tr. 504). According to Bechtel, Smith "gave a favorable response that it was fine with me" and told him to check with the "engineer in Michigan to work out the technical details and see if the proposal could work in terms of hanging the antenna and the cost of the antenna" (Tr. 504). Bechtel testified that Smith answered "It was okay with him" although he could not recall the precise words (Tr. 550). Bechtel made notes of the conversation. These notes were thrown away after they were transferred to another sheet of paper (Tr. 555). According to those notes, and Bechtel's recollection, Smith gave him an "affirmative indication for application purposes at least" (Tr. 555-556; Barrera Ex. 16), but those were Bechtel's words, not John Smith's (Tr. 556). Bechtel testified that he "was exceedingly pleased" because "that was the big pussycat" (Tr. 556). According to Bechtel, Smith told him to call Gerry Vander Sloot in Grand Rapids and work out the technical details (Tr. 504), and gave him Gerry Vander Sloot's telephone number (Barrera Ex. 16). In his discussion with Smith, there was no discussion of Smith's authority to give Barrera permission to use the site (Tr. 560). Smith recalls only that he spoke with a male lawyer from Bechtel & Cole who he believes was Gene Bechtel, either very soon before or after he spoke with Aida Barrera (Tr. 578, 591). Smith could not give any specific recollection with respect to the substance of that telephone conversation with Gene Bechtel (Tr. 578, 580, 591), except to say that if Bechtel asked about the tower "I would have said the same thing I always said; you need to talk to Jerry Vander Sloot. He was the Director of Engineering" (Tr. 592). Smith also does not recall ever saying to Bechtel (or anyone) words to the effect that "it's OK with me to use the tower, check with Gerry Vander Sloot" (Tr. 580). Smith testified that he would have remembered if he said those words or had given Gene Bechtel or Aida Barrera permission to use the KIXS antenna site, because he would have remembered making a commitment concerning the tower for the Company (Tr. 580). "I feel I would have remembered making a commitment like that" (*Id.*). Smith flatly denied giving Barrera permission to use the KIXS site during his conversations either with Barrera or Bechtel (Tr. 580-581).

68. Bechtel spoke with Barrera on April 17 at 9:30 a.m. and reported the "good news that we were on track to having this 2000 foot tower" (Tr. 514). Bechtel testified that Barrera also told Bechtel "her good news that John Smith had given a favorable reaction from Mr. Vander Sloot" (Tr. 567). Barrera recalls that Bechtel reported that after his conversation with Smith that "everything was a go" and that "the engineers were going to get the application together" (Tr. 414).

69. Bechtel subsequently called Vander Sloot at noon on April 17 and spoke with him for seven minutes. (Stipulation, Tr. 530). Bechtel did not tell Vander Sloot that Smith had given him permission to use the tower for application purposes. The most he said was that Smith had "reacted favorably" and referred him to Vander Sloot to work out the technical details and learn of the costs involved in using the tower (Tr. 509-510). He also told Vander Sloot that Neil Smith, their consulting engineer, would contact him (Tr. 509- 510). Vander Sloot did not give Bechtel permission to use the tower (Tr. 510, 551). "He did not say one word--anything one way or another . . . " (Tr. 510). Vander Sloot told him that it was necessary to see if they needed to modify the tower and what the cost would be (Tr. 511). Bechtel described the conversation as a "carbon copy" of "20 or 30 site clearance conversations I have had over the years which went right into (sic) no complications" (Tr. 552). Bechtel testified that the purpose of the conversation was that he [Vander Sloot] needed information concerning the cost and feasibility of modifying the tower (Tr. 558-559). Vander Sloot recalls only that he received a telephone call from a "male voice" at Bechtel & Cole, Chartered, the law firm, and asked if they could use the KIXS-FM antenna site (Tr. 640). Vander Sloot recalls that he told the "male voice" the same thing that he told "the engineer" Neil Smith, which was that the tower was not designed to support a UHF television, and that Grace was in a big hurry to build the tower, but that he would check with the tower manufacturer to see if the tower could be modified to accommodate another antenna and the cost of such modification (Tr. 639-641). Vander Sloot emphatically denied giving Bechtel (or anyone else) permission to use the KIXS tower (Tr. 647-648, 682). Moreover, Vander Sloot does not recall that Bechtel told him that Smith had given Barrera permission to use the site (Tr. 679), and further testified that if Bechtel had told him that "John Smith had told him it was okay to use the tower, I would have been on the phone fast with John" (Tr. 679), because "John didn't have that kind of power to authorize that." (*Id.*). Vander Sloot said that only he had the authority to make that sort of commitment on behalf of Grace Broadcasting (other than the president at the corporation), and certainly that sort of authorization could not have come from John Smith (*Id.*).

70. Following his conversation with Vander Sloot, Bechtel called Neil Smith and told him to call Vander Sloot (Tr. 546). Neil Smith had also recently returned from the NAB, and called Vander Sloot at the request of Bechtel to discuss the engineering details of the proposal, because Bechtel felt it would be better for an engineer to talk to an engineer (Tr. 253-254). When Smith called, he did not know if Gerry Vander Sloot was Vice President of Engineering, or Director of Engineering, but he knew he was in overall charge of their broadcast facilities (Tr. 254). The length of the conversation with Mr. Vander Sloot was 15 minutes (Stipulation, Tr. 271). Smith knew Vander Sloot because he had been active on some industry committees with Vander Sloot (Tr. 276). Smith had not, however, dealt with Vander Sloot on a business level (Tr. 276).

71. Neil Smith testified that he explained the nature of what Barrera proposed, the type of antenna and other general technical terms, but that Vander Sloot did not essentially respond (Tr. 254). Smith testified that "Vander Sloot is a very experienced engineer and had no problem understanding what out intention was" *(Id.)*. Smith did recall, however, that Vander Sloot raised the issue of whether or not the KIXS tower, as designed, "would be able to handle" the antenna that Barrera proposed *(Id.)*. Vander Sloot, according to Smith, said that he would have to talk with the manufacturer of the tower to determine if the tower was capable of handling the Channel 62 antenna tower, and if not, what would be required in the way of costs to modify the tower to accommodate the 62 antenna (Tr. 254-255). At that time, according to Smith, Vander Sloot also mentioned that if it were necessary to make modifications to the tower, he [Vander Sloot] probably would require that Ms. Barrera pay for those costs at that time (Tr. 254), "on a fairly short time frame" (Tr. 269). Smith responded "that that, of course, wasn't any of my business, but I guessed that she probably would not wish to do that" (Tr. 254-255). Smith testified that he told Vander Sloot that Barrera would not want to pay for the tower modifications at that time because it was a speculative venture (Tr. 270).

72. Smith testified that there was nothing said by Gerry Vander Sloot during their conversation that Neil Smith would consider as "reasonable assurance" of the availability of the KIXS antenna site for Aida Barrera's application (Tr. 277-278). The source of statements made in the engineering statement in affidavit form prepared by Neil Smith which stated that "KIXS-FM has agreed to side mount Barrera's antenna," was not Vander Sloot, but conversations with either Ms. Barrera or her attorney; Smith does not remember which (Tr. 277-278). All of the substance of the conversation that Smith remembers with either Ms. Barrera or her attorney concerning the conversations which prompted him to make that statement was that "all I recall is that the substance of the conversation was that this tower was--well, we could go ahead--we can go ahead and specify the tower and their engineering" (Tr. 279). Smith did not recall exactly when those discussions took place, but remembered they occurred during the beginning of the week during the NAB meeting in Dallas (Tr. 279-280). These discussions were between an associate of Neil Smith's, Kevin Fisher, and Bechtel, when " . . . it was essentially decided that this would be the site that we would specify" (Tr. 280), although further discussions occurred on Wednesday when the convention was over (Tr. 280). Smith had approximately two calls with Bechtel or Barrera prior to the time he called Vander Sloot (Tr. 280).

73. Smith "presumes" that in speaking with Vander Sloot he gave him information concerning the sort of transmitter, antenna and waveguide that Barrera would be specifying. However, he conceded he really did not know what sort of waveguide, rectangular or circular that Barrera would use (Tr. 259, 260). Smith does not specifically recall any of these details or even talking with Vander Sloot about the size of the waveguide (Tr. 261). Smith does recall, however that he never asked Vander Sloot for any information about the tower, any specifications about the tower, the structural analysis, the number of other possible tenants, etc. (Tr. 261). Smith never saw any information relating to the KIXS tower, although Vander Sloot did have the tower description at the time if Smith had requested them (Tr. 643). Smith did not discuss, for example, the windloading of the tower with Vander Sloot (Tr. 262, 284). Smith does not know the zone for windloading under EIA standards that that part of Texas would be in, or the maximum windloading for a particular tower in a particular zone (Tr. 262). It would, however, make a difference on the windloading of the tower if Barrera specified transmission line or waveguide (Tr. 263). Smith did not have this information despite the fact that the carrying capacity or ability of the tower to support antenna structures is regulated by windloading (Tr. 263), and the taller the tower the more critical the windloading is (Tr.l 263-264). Smith is not competent to make the analysis because he is an electrical engineer, not a structural engineer, and the effects of adding equipment on the KIXS tower were beyond his area of expertise (Tr. 262). Smith does not recall contacting either Bechtel or Barrera to report on his conversation with Vander Sloot before the application was filed (Tr. 276). Ms. Barrera recalls speaking with Neil Smith on April 17, and that Neil Smith "indicated that he was talking with Gerry Vander Sloot working out the details" (Tr. 415).

74. Vander Sloot testified that Neil Smith called him and basically told him that he had a client interested in leasing space on the tower which would involve a UHF TV antenna for Channel 62, complete with feedline. Vander Sloot expressed to him that it was "not a timely time to talk about this" because of the planning that had already gone into the tower, and the "geotechnical work had already been done" (Tr. 637). Vander Sloot testified, in addition, that his response "was very negative because of the time factor. I was negative because of the completed work at that point. This would upset the time schedule that we had . . . I knew that this would disrupt the schedule" (Tr. 638Z). Vander Sloot told Smith that he would check with the tower manufacturer about the possible modification of the tower for a channel 62 antenna, and what it would cost to modify the tower and call him back. Vander Sloot further stated that there was nothing in his telephone conversation which would indicate that he had given Neil Smith permission to use the KIXS tower, "this, from a start, looked like an impossibility and I expressed that to him" (Tr. 638, 639).

75. After the conversation with Neil Smith, "as a courtesy" and "as a favor to Neil . . . because he knew him from past NAB's," and because "of [his] own curiosity" (Tr. 660) Vander Sloot called Pete Stark at Stainless, Inc. to determine if modifications would need to be made to the tower to accommodate a Channel 62 antenna, and if

so, how much those modifications would cost (Tr. 641-642). Stark told him that to modify the tower to accommodate the channel 62 antenna before it was constructed would cost roughly 150-200,000 (Tr. 642). The issue of whether the tower *could* be modified after it were constructed to accommodate the channel 62 antenna was discussed, and Stark told Vander Sloot " . . . that the costs would be more, and he had some reservations on whether the tower could be modified at all after we went ahead and built the tower that we had agreed to build" (Tr. 642). Vander Sloot never received a figure for how much more it would cost to modify the KIXS tower after it was constructed even if such modifications were feasible (Tr. 674). After he received that information from Pete Stark Vander Sloot tried to call Neil Smith and was unable to reach him (Tr. 648). At that point Vander Sloot called Bechtel & Cole, since he believed they represented the same people that Neil Smith did (*Id.*). Vander Sloot attempted to reach Gene Bechtel on the very next day, April 18 at approximately 2:00 p.m. (Barrera Ex. 17), but was unsuccessful. Bechtel gave Vander Sloot's telephone call message to Shelly Sadowsky on Friday or possibly the following weekend and asked her to return the call (Tr. 512-513).

76. Shelley Sadowsky is an associate who has worked for Bechtel & Cole since 1983 (Tr. 303). Ms. Sadowsky was responsible for preparing the physical aspects of Aida Barrera's application (Tr. 365). Gene Bechtel told her to prepare the site certification inserting John Smith's name (Tr. 365). Bechtel did not give any information concerning the conversation other than "put down John Smith's name there" (Tr. 366). Ms. Sadowsky sent the application to Ms. Barrera by Federal Express on April 18 for Saturday delivery (Tr. 368), and Ms. Barrera received her application by Federal Express on Saturday, April 19 (Tr. 415). Ms. Barrera executed the application on that date and sent it back to Bechtel by Federal Express (Tr. 416). The site certification page included in the application had a "yes" in the box indicating that Aida Barrera had reasonable assurance of her antenna site, and identified "John Smith, Vice President and General Manager of Station KXIS-FM, Killeen, Texas" as the source of the reasonable assurance (Barrera Ex. 18). John Smith was not the "Vice President and General Manager of KXIS-FM," and Bechtel didn't know what Smith's capacity at the station was (Tr. 550), or where the information included in the application form came from (Tr. 551).

77. On Monday morning, April 21, Ms. Sadowsky called Vander Sloot (Tr. 367). According to Ms. Sadowsky, Vander Sloot made clear that only he had the authority to speak for Grace (Tr. 369). Vander Sloot told her that he had checked with the manufacturer of the tower concerning the possibility of locating Barrera's antenna on the KIXS tower, and was told that the tower could not support the antenna without modifications costing between 150-200,000, and that payment "would have to come immediately so that the tower could be ordered with those modifications" (Tr. 305). Ms. Sadowsky asked Vander Sloot something to the effect if they could not work out some other arrangements at a later date after Barrera got the license (Tr. 357, 380). Vander Sloot was adamant that the money needed to be paid "up front." Vander Sloot told her that he had had a conversation the previous week with Neil Smith in which he [Vander Sloot] had told Smith that if modifications were necessary Vander Sloot would require that the money would need to be paid now, before the tower was constructed, and that Smith had told him that he doubted whether the client "would be willing to pay now when her application was still a speculative venture" (Barrera Ex. 11). Ms. Sadowsky did not recall, specifically asking Vander Sloot if Barrera could specify the KIXS tower as her antenna site (Tr. 359), but she did recall that Vander Sloot told her that "we could not specify that tower" (Tr. 360). Ms. Sadowsky also understood from the conversation that " . . . I mean, I didn't feel like I was negotiating with him in that conversation at all . . . " (Tr. 358), and that Barrera's agreement to pay the 150-200,000 was a condition precedent to any sort of agreement regarding the tower (Tr. 360).

78. Vander Sloot recalls that there were two conversations with Shelley Sadowsky at Bechtel & Cole, the first with Shelley Sadowsky and the second with Shelley Sadowsky and Jeanne Smith. Vander Sloot told Sadowsky that "we would not even talk about any lease" without a payment of 150,000 to 200,000 to modify the tower," then and only then would we talk about lease arrangements" (Tr. 649). Vander Sloot also told her that the money needed to be put "up front," and that "time was of the essence" (*Id.*). Vander Sloot specifically recalls that Shelley Sadowsky asked him more than once if Barrera could specify the KIXS-FM tower in Aida Barrera's application, and that he specifically said "no, absolutely not" (Tr. 651, 659). When Sadowsky asked, Vander Sloot said that his response was a flat refusal (Tr. 653). Although Vander Sloot was unsure whether the question was posed during his first or second conversation with Sadowsky, he testified that it could have been in both, since the question was asked of him more than once (Tr. 650-651, 654-655, 659, 681). Vander Sloot rejected Sadowsky's request to allow Barrera to specify the KIXS site because the tower was not designed to support the antenna, as ordered, and "it would be deceitful for me to let anyone put that as a tower location because the structure itself wouldn't hold the antenna" (Tr. 651). Either after his April 21 or April 28 phone conversation with Sadowsky, Vander Sloot contacted Grace's communications counsel, Bill Reyner, to inform him of his conversations with Barrera's representatives and of his belief that it would be "deceitful" to allow Barrera to specify a structure as an antenna site which was not designed to hold the antenna (Tr. 680-682). Counsel concurred in Vander Sloot's judgment (Tr. 653). Vander Sloot also told the president of Grace Broadcasting the same thing and the president told him that he did the right thing (Tr. 680-681).

79. Ms. Sadowsky, immediately following her conversation with Vander Sloot on April 21, turned to the word processor on her desk and typed a contemporaneously prepared memo addressed to Gene Bechtel (Tr. 344, 357). That memo read in pertinent part:

> This morning I spoke with Jerry Vander Sloot (sic) the engineer at Station KIXS . . . He wanted to let us know that we could not specify the tower which his station proposes to construct. He told me . . . he was informed that the tower, as planned, would not be suitable for mounting a television antenna for channel 62 without major alterations. I asked him whether there was any way that we would work out an arrangement so that our client could pay for the necessary changes to the tower if she gets the license . . . He told me the modifications would cost in the range of150,000 to200,000 . . . He told me he had

had a conversation with Neil on Thursday, in which they discussed the possibility that Aida would pay for altering the proposed tower and Neil told him that he didn't think the client would be willing to pay now when her application was still a speculative venture. Vander Sloot also told me that he wants to finalize the contract for the tower so that the tower can be ordered by the end of this week. I told him that I would pass the information to the client and get back to him if I thought we could work out some arrangement with him.

(Barrara Ex. 11).

80. Following this conversation, Ms. Sadowsky called Neil Smith at Smith & Powstenko to determine if he had any information concerning the tower (Tr. 322). Neil Smith was not available, but Jeanne Smith answered the telephone (*Id.*). Mrs. Smith's only previous connection with the application was to type and edit the text in the engineering, and perhaps sketch the tower for the draftsman to put in final form (Tr. 295-296). Sadowsky related Vander Sloot's conversation to her. Jeanne Smith's response to Vander Sloot's demand that the money be paid up front before the tower is constructed is "that's nuts" (Tr. 381). Jeanne Smith told Ms. Sadowsky that a tower could be modified at a later date, that there were techniques that could be used to avoid major modifications. Ms. Smith agreed with Ms. Sadowsky's request that she take part in a conference call to Vander Sloot to discuss the technical options with him (Tr. 310-311). Ms. Smith did not indicate that she would be unavailable or that there would be any limitations on her time during the upcoming week which would prevent her from taking part in a conference call with Vander Sloot (Tr. 363). At the time of her conversation with Ms. Sadowsky, Jeanne Smith had not spoken with Mr. Vander Sloot about the carrying capacity, structural analysis, windload capacity, or any other technical aspects of the KIXS tower; had not seen any structural analysis, specifications, or any other technical information concerning the KIXS tower (Tr. 298-299); and had absolutely no knowledge concerning structural engineering (Tr. 300). Ms. Smith did not know what other equipment was planned to be located on the tower (Tr. 299). The only information she had was the height of the tower, the fact it was to be guyed, and the fact that the FM would be located on the tower (Tr. 299). She did not know if Barrera was going to use wave guide or transmission line, or whether that would make a difference (Tr. 300). Jeanne Smith is not a structural engineer (Tr. 294), and was basing her advice "on experience" (Tr. 295, 300). One of the technical alternatives mentioned by Ms. Smith to Ms. Sadowsky which would allow the tower to accommodate the Channel 62 antenna involved top-mounting the antenna on the top of the tower (Tr. 301). Ms. Smith was under the impression that the KIXS antenna would be side-mounted (Tr. 301), but, in fact, the KIXS antenna was to be top-mounted (62 Broadcasting Ex. 4, p. 1), a fact recognized in the Engineering Statement and antenna sketch filed by Barrera's application.

81. Some time after the conversation with Jeanne Smith, Aida Barrera called, or Shelley Sadowsky called Aida Barrera (the testimony is unclear which) and Ms. Sadowsky shared with Ms. Barrera the substance of her conversation with Mr. Vander Sloot (Tr. 306). Ms. Sadowsky and Barrera spoke at least twice on April 21 (Tr. 419), but Ms. Barrera did not talk to either Neil or Jeanne Smith or Gene Bechtel on that day (Tr. 421). Sadowsky told Barrera about Vander Sloot's "demand that if we are to use the tower site we have to — pay for modifications to the tower which is to be ordered in the immediate future . . . " of150,000 -200,000 (Tr. 319). Sadowsky and Barrera discussed Barrera's options, and discussed the fact that Barrera wouldn't want to, and couldn't come up "with that amount of money quickly" (Tr. 319-320). Barrera told Sadowsky to go back to Vander Sloot with the "counterproposal" that Barrera would pay those costs at the time her construction permit were granted (Tr. 319-320). Ms. Barrera also discussed the fact that she was scheduled to be in Detroit and would try to arrange a meeting with Harvey Grace or Vander Sloot on April 28 in Detroit or Grand Rapids (Tr. 320-321). Ms. Sadowsky discussed what "reasonable assurance" meant during this conversation, but did not discuss what would happen if they changed the site certification from "yes" to "no" or simply left it out (Tr. 372-373). Ms. Barrera testified that she was shocked when she heard of Vander Sloot's demand to pay all of the money up front (Tr. 417), and for a moment considered getting the money (Tr. 421). However, Ms. Barrera testified that she "really had to discount that as a realistic proposal because it was too risky a proposition, since I did not have a construction permit . . . " (Tr. 421). Ms. Barrera doesn't remember if Sadowsky had told her that Vander Sloot had already rejected Sadowsky's request to work something out after Barrera got the license (Tr. 449), nor did she recall being told that Vander Sloot had told Sadowsky that the KIXS tower could not be specified as her antenna site (Tr. 448). Barrera testified, however, "I knew that the payment of this sum was a condition to renting space on the tower" (Tr. 448). Vander Sloot did not think he was negotiating when he spoke to Ms. Sadowsky, and testified that his position that Barrera pay the money up front was nonnegotiable (Tr. 657-658).

82. Ms. Sadowsky and Ms. Barrera discussed at that time what to do about the site certification, and Ms. Sadowsky suggested that the site certification in the application be modified to include the phrase "negotiations in process" (Tr. 420). Ms. Barrera agreed with and authorized this approach, but said that it was to be checked with Bechtel before it was inserted in the application (Tr. 341, 420-421). The actual language "negotiations in process" was inserted on the site certification page of the application by Bechtel and Cole on April 21 (Tr. 341). The check in the box indicating "yes" for reasonable assurance was not changed, however (Tr. 342). Barrera felt that changing her site certification to "negotiations in process" was appropriate because she honestly believed that "negotiations" were still open because there had not been a "resounding no" from Grace Broadcasting (Tr. 425). Barrera also testified that when she spoke to Sadowsky she knew that Neil Smith had discussed the matter with Vander Sloot and "I just assumed that whatever had to be done to the tower could be done at the time I was ready to rent space on it" (Tr. 442). There was no discussion between Barrera and Ms. Sadowsky of calling John Smith at this point, however, "because Mr. Bechtel was really in charge of handling the matter . . . with whoever" (Tr. 451).

83. Some time after the conversations with Aida Barrera, and in the early afternoon, Ms. Sadowsky organized her thoughts concerning her conversations of the morning with Vander Sloot, Barrera and Jeanne Smith in a handwritten memo for Gene Bechtel's attention (Barrera Ex. 12). In that memo, Ms. Sadowsky outlined the situation concerning the antenna site as it had evolved from the morning, summarized her conversations with Ms. Barrera and with Jeanne Smith (Barrera Ex. 12), particularly that Ms. Barrera didn't want to pay the money now, and knew that " . . . the engineering was subject to change," and noted:

> I am reluctant to call Vander Sloot back *before* filing the application. I believe that based on the conversation I had with him today, the negotiation for site certification is *'still in process'* and I suggest, as a result of his call this AM, we include this language in the site cert. to avoid problems down the line (Barrera Ex. 12) (emphasis original).

Ms. Sadowsky underlined to emphasize for Bechtel's attention the word "before," and the phrase negotiations "still in process" (Tr. 386). At this time Ms. Sadowsky was aware of Commission precedent where simply specifying a site was an implied representation of reasonable assurance (Tr. 390). A site certification was, therefore, "surplus" (Tr. 390).

84. Ms. Sadowsky testified as to her anxiety that day, expressed in the handwritten memo to Bechtel for her reluctance to call Vander Sloot: "[I] personally was very concerned about the whole process blowing up in our faces and being left without a site. I didn't know what our alternatives were . . . " (Tr. 313). Ms. Sadowsky described the situation following Vander Sloot's call as " . . . I mean, I thought we were facing a crisis here and I really didn't know what to do about it . . . " (Tr. 316). Ms. Sadowsky also testified, however, that on April 21 she was aware of a case, and had done legal research on site availability, and found a *Hearing Designation Order* in which an applicant which had not filed a site certification in his application was given 20 days to supply the missing certification or a site availability issue would be added (Tr. 354). Sadowsky testified that if:

> we got a negative decision before we filed the application, I honestly don't know what we would have done . . . (Tr. 316), and that she "really didn't know what we would have done if I had called back Vander Sloot and Vander Sloot maintained the same position he maintained . . . I mean, I don't know what to do . . . when you learn at the 11th hour that you may have a problem . . . do you just forego the opportunity if you find out that the site falls through (Tr. 388).

85. Ms. Sadowsky expressed her fears to Gene Bechtel in a conversation later that day, and gave him the handwritten memo which expressed her reluctance (Tr. 327). She said that her fears were put to rest by Bechtel, however, whom she described "in his typical style he was very calm" (Tr. 318). She told Bechtel that Vander Sloot had told her that if Barrera were to use the tower she would have to pay150,000 to200,000 immediately (Tr. 306-307). By that point Ms. Sadowsky had received an executed site certification along with the rest of the application from Ms. Barrera indicating that Barrera had reasonable assurance of the availability of her tower site (Tr. 307). At that point the conversation with Bechtel was in the vein of "what do we do now" (*Id.*). Bechtel and Sadowsky discussed several options, one of which was to go back to Vander Sloot offering to pay the money after the construction permit was granted (Tr. 308). They also discussed the possibility of "getting the other applicants together and going to Grace as a group" (*Id.* ; Tr. 325-326). They also discussed including inserting the phrase "negotiations in process" on the site certification (Tr. 309), which Bechtel approved. Sadowsky acknowledged, however, that whatever "negotiations in process" were occurring at that point were with Vander Sloot, not with Smith, the party identified in the site certification page in the application (Tr. 372). The reason John Smith's name wasn't changed was that "no one thought of it" (Tr. 373). The phrase "negotiations in process" had been successfully used once before by the law firm to describe a situation where the tower owner had acquiesced to the applicant locating on the tower, but the land owner, who had the legal right to approve tenants on the tower, could not be reached prior to the filing of the application (Tr. 327). The phrase "negotiations in process" was used, according to Ms. Sadowsky, "to notify the Commission that specifics for the use of the tower site were still not nailed down . . . that they were in process" (Tr. 309). Bechtel testified that the phrase was taken from similar phraseology used in financial certifications over the years to convey that "we did not have this transmitter site pinned down" (Tr. 517-518). Bechtel stated that he directed Ms. Sadowsky to change the site certification "so that we would not be misleading the Commission that we had full reasonable assurance . . . " (Tr. 518). The "negotiations" that were "in process" were to go back to Vander Sloot with the proposal that Barrera would pay for the costs of modifying the tower when she had received a construction permit (Tr. 309), which Ms. Sadowsky described as a "reasonable counter offer" (Tr. 354-355, 518). Both Ms. Sadowsky, during her phone call with Jeanne Smith (Tr. 381), and Bechtel had been told by an engineer prior to April 21 that the KIXS tower could be modified to accommodate Barrera's antenna (Tr. 523). Bechtel believed that "negotiations were still in process" because they had several days to reply to Vander Sloot, and sometimes "when a party gives you a firm position sometimes they can be talked out of it" (Tr. 538). In his experience, property owners had said no, and "we were able to successfully move the owner off the no position" (Tr. 526). The "counterproposal" which was to be made to Vander Sloot was, however, the same proposal that Sadowsky had made to Vander Sloot during their morning conversation which he rejected (Tr. 358). Vander Sloot's rejection came, Sadowsky acknowledged, after Vander Sloot had spoken with the tower manufacturer (Tr. 377-378). The "counter proposal" was also the same proposal that Vander Sloot had told Ms. Sadowsky that he had discussed with Neil Smith the previous week and rejected (Tr. 358). Bechtel testified that Vander Sloot had set forth an adamant position (Tr. 554), and Ms. Sadowsky believed that "things looked dim given my conversation with Vander Sloot" (Tr. 355). Sadowsky believed that payment of the money "up front" was a precondition to the specification of the site (Tr. 360, 380). Sadowsky and Bechtel also discussed the possibility of calling Vander Sloot, with "an engineer

on the line," either Jeanne or Neil Smith, to attempt to convince him that it was possible to modify the tower at a later date (Tr. 314-315). Bechtel, however, also assumed that it would cost more to modify the tower after it had been constructed than the costs Vander Sloot had quoted in the morning for modification before the tower was erected (Tr. 552).

86. One alternative that Bechtel discussed with Ms. Sadowsky was proposing to the other applicants for channel 62 that the group agree to pay for the modifications of the tower since one of them would eventually receive the construction permit (Tr. 308, 538, 546). In fact, none of the other applicants were ever contacted (Tr. 546), because, both Bechtel and Sadowsky testified, there was no way of knowing how many applicants had filed at that point (Tr. 356, 546). Both Ms. Sadowsky and Bechtel, however, knew that Mrs. Beck had filed an application. There was no effort made during this time to contact either Ms. Beck or her counsel to determine if they were interested in the proposal (Tr. 547).

87. Bechtel was effectively making decisions for Ms. Barrera at this point concerning significant application matters (Tr. 318, 371, 529). On the afternoon of April 21, Bechtel testified that he simply did not share Ms. Sadowsky's anxiety concerning the antenna site situation, and saw no need to call Vander Sloot back right away (Tr. 527). Bechtel stated that he thought it was "premature to worry about this . . . " (Tr. 518) and that he simply did not like to proceed that way. Bechtel testified that " . . . I like to reflect, get my ducks lined up, and do it in a careful way, a thoughtful way" (Tr. 553-554).

88. Bechtel stated that because he felt that they should go back to Vander Sloot with an engineer on the line, he "counseled Shelley that we should not call back right away on April 21st, that she was concerned about doing that as a matter of eliminating our site certification" (Tr. 527). Bechtel testified that this was not a "deliberate waiting or holding off," but "simply I wanted to reflect on it" and "think through alternatives" (*Id.*), and that "it was getting late, and we were about getting ready to file the application and that was not a sensible time to try to make a discussion that would lead to a less adamant position" (Tr. 531). Bechtel testified, " . . . I certainly didn't want to go back at a person who had given me an adamant position and argue with him right at the moment" (Tr. 554). Bechtel also stated that we gave some thought to calling John Smith, but rejected the idea (Tr. 559). Sadowsky stated at least twice that she wouldn't know what to do if she called Vander Sloot back and he remained adamant, as he ultimately did (Tr. 316, 388). Despite these facts, and the fact that Sadowsky testified three times that the fact Vander Sloot might turn her down if she called was a concern--a factor in her mind (Tr. 316, 325, 388) -- Ms. Sadowsky denied there was a decision made to defer calling Vander Sloot until after the application was filed, or that she delayed calling Vander Sloot back because she feared he would reject their proposal again (Tr. 314, 316, 325, 350, 361-362).

89. In his 28 years of experience, Bechtel described Mr. Vander Sloot's demand that the money be paid up front as "unprecedented" (Tr. 553). In his experience, tall tower owners generally plan on having tenants on their tower and plan their towers accordingly (Tr. 547-548). According to Bechtel antenna site owners may say no, for one reason or another, but they have never said "you have to pay the money so quickly, before you have the license" (Tr. 553). Bechtel has also had experience where antenna site owners change their mind (Tr. 526).

90. Bechtel testified that he did not see Vander Sloot's demands as creating a crisis (Tr. 527), although he recognized that Vander Sloot's position was "hard-nosed" (Tr. 531), "adamant" (*Id.*, Tr. 554), and that Barrera's agreement to pay the money up front was a condition precedent to Barrera's ability to specify the KIXS tower as her antenna site (Tr. 554). Bechtel, however, did not think that he even needed to submit an antenna site certification with the application (Tr. 532), and testified that it would have been perfectly acceptable to submit a certification which said "no," or no certification at all (Tr. 532). Bechtel also testified that he could have filed the engineering specifying a site even if the site owner had given an unequivocal "no" to the use of the site, with the "fine print" that the "site was not pinned down" and have amended the application as of right later (Tr. 533-534, 536). According to Bechtel, Barrera did not even need a site (Tr. 532). Bechtel testified that "so long as he told the Commission that they did not have a site, I was not concerned" (Tr. 533). Bechtel emphasized several times that he did not need a site to file an application so long as he wasn't misrepresenting that he had a site, so long as the Commission was informed that "the site was not pinned down" (Tr. 533, 537). Bechtel denied that Barrera mispresented anything, noting that if he had left a "yes" on the site certification he would have been "guilty of misrepresenting to the Commission . . . Here I did not. I filed it [the engineering] and the certification which told the Commission that I didn't have reasonable assurance within its rules and requirements" (Tr. 534-535). Both Bechtel (Tr. 533) and Ms. Sadowsky were aware of Commission precedent which held that simply specifying a site was an implied representation that the applicant had reasonable assurance (Tr. 390). In response to a direct question Bechtel testified that in his opinion Barrera did not have reasonable assurance of the availability of her antenna site when she filed her application on April 22 (Tr. 544 *see also*, Tr. 518, 534). Ms. Sadowsky's opinion was the same, in that she believed Barrera's site certification should have been changed from "yes" to "no" with the same qualification concerning "negotiations in process" (Tr. 384, *see also*, Tr. 388). Ms. Sadowsky admitted there was an inconsistency between a "yes" in the box for reasonable assurance and the phrase "negotiations in process" (Tr. 385). In filing the application with the site certification marked "yes" Bechtel denied that Barrera was making a representation that she had reasonable assurance as to her antenna site, "It [Barrera] was making a representation that there was reasonable assurance except that negotiations were in process" (Tr. 545).

91. Barrera's application was filed on the last day for filing applications, April 22, 1986. The Certification of Site Availability was included in the application with the box marked "Yes" that the applicant had reasonable assurance of the antenna site, with the phrase "negotiations in process" inserted below (Barrera Ex. 18). No other explanation was offered. John Smith was identified as the source of Barrera's reasonable assurance under question 2 of the "Certification of Site Availability," where the applicant is instructed:

> If *reasonable assurance* is not based on applicant's ownership of the proposed site or structure, *applicant certifies* that it has obtained such *reasonable assurance* by contacting the owner or person possessing control of the site or structure (emphasis added) (Barrera Ex. 18).

There were no changes made in the application as filed to qualify the statements made in the Engineering Statement, submitted under affidavit, which represented that "KIXS-FM has agreed to permit the applicant to specify the side-mounting of the proposed antenna on this structure." Although at that point whatever negotiations were occurring were taking place with Vander Sloot, not John Smith (Tr. 372, 435), the site certification did not change the reference to "John Smith," the "President and General Manager of KIXS" as the source of the applicant's reasonable assurance (Barrera Ex. 18) because, Ms. Sadowsky testified, she didn't think about it (Tr. 373). Ms. Barrera's testimony indicates that she knew from her own conversation with Smith that any "negotiations" with Grace were to be carried on with Vander Sloot (Tr. 436). When questioned why Vander Sloot's name was not included on the original application site certification instead of Smith's, Ms. Barrera answered that Smith's name was included at Bechtel's suggestion. " . . . I guess because I had talked to Smith. I don't know, I really don't know. It was the name Bechtel had" (Tr. 436).

92. Sadowsky did not attempt to reach Vander Sloot between April 21 and April 25 (Tr. 323, 362). She asserted that she did not put off calling Vander Sloot on April 21 and April 22 because of fear that he would reject the "counter offer" and the application could not be filed as a result (Tr. 324-325). Sadowsky admitted, however, "[t]hat was going through my mind" (Tr. 325 and that "I personally was very concerned about the whole process blowing up in our faces and being left without a site" (Tr. 313). Ms. Sadowsky first attempted to reach Vander Sloot on April 25, but he was unavailable that day (Tr. 290, 362).

93. When Ms. Sadowsky reached Vander Sloot on April 28 Ms. Smith was also on the line. Ms. Sadowsky related that her client would be willing to pay the150,000 -200,000 at the time the application was granted. Ms. Sadowsky also introduced Jeanne Smith, and referred to Ms. Jeanne Smith for support that it was technically feasible to modify the tower to accommodate the channel 62 antenna after it was constructed (Tr. 329). Jeanne Smith pointed out that certain steps could be taken to strengthen a tower to allow additional equipment to be located on it, such as top-mounting the antenna to spread the weight over a greater area, and to use an antenna with fewer bays (Tr. 291). Vander Sloot's reaction was "very negative . . . I don't know if he said 'no way,' but we felt very strongly that we weren't going to get very far with him on getting leased space" (Tr. 292). Vander Sloot described Barrera's position of not wishing to pay money up front as "reasonable" (Tr. 655) and testified that he didn't expect a favorable response (Tr. 655). Vander Sloot clearly had no interest in Barrera's proposal (Tr. 330, 656). At that point Ms. Smith asked if there was land available close to the KIXS tower, and Vander Sloot testified that he did not believe that any was available (Tr. 292). Neither Ms. Sadowsky nor Jeanne Smith told Vander Sloot that Barrera's application had already been filed specifying the KIXS-FM tower (Tr. 301, 308). After that conversation Ms. Sadowsky and Jeanne Smith believed that there was no further purpose in talking with Vander Sloot and that it would be necessary to obtain a new antenna site (Tr. 331-332, 521-522).

94. Following the conversation with Vander Sloot, Ms. Sadowsky called Aida Barrera (Tr. 330). Ms. Barrera had planned to be in Detroit during that week, and had planned to speak either with Harvey Grace or with Vander Sloot about the tower issue. Ms. Barrera gave up this idea (Tr. 331, 422-423). Ms. Sadowsky and Jeanne Smith told her that Vander Sloot's position was adamant and that everything had fallen through at this point (Tr. 423), and it was their recommendation that Ms. Barrera needed to obtain a new antenna site (Tr. 331-332). Ms. Barrera during the early part of May contacted a consultant, Noel Willets, to assist her in obtaining an antenna site for her application (Tr. 424). Once Willets and Ms. Barrera went to work, they found an antenna site location within a day (*Id.*), sometime in early May (Tr. 539). This antenna site was specified in Ms. Barrera's amendment of June 5, 1986 (Tr. 334). Following the conversation on April 28, however, neither Ms. Barrera nor any of her representatives informed the FCC that she was no longer specifying the antenna site noted in her application (Tr. 540), even though the engineering could have been completed within 24-28 hours (Tr. 541). Bechtel could not testify as to reasons for that, except his speculation that he believed that a "B" cut-off amendment would be forthcoming soon, and didn't think of the loss of Barrera's site as a separate item (Tr. 561-563). A new site was specified in Barrera's B cut-off amendment filed on June 5, 1986.

95. John Smith first learned in August 1986 in a conversation with Doug Rabb that Aida Barrera had specified the KIXS antenna site, and used his name in her application (Tr. 582-583). Smith testified that Raab told him that he (Raab) had talked to somebody and "your name is being used and our site is being used on an application" (Tr. 582). Smith's response was "no, that's not possible" (*Id.*). Smith called Gerry Vander Sloot in Grand Rapids to ask Vander Sloot if he [Vander Sloot] had authorized Barrera to specify the antenna site, or to use Smith's name as authority for doing so (*Id.*). According to Smith, Vander Sloot told him that he had not; that he had told Barrera's representatives that they could not use the tower because the tower was not designed to hold that antenna (*Id.*). Smith then called Aida Barrera and asked if she was using the KIXS antenna site in her application, and Ms. Barrera responded that she had another site (Tr. 582). Ms. Barrera recalls that she told Smith during the conversation that she had originally specified the KIXS tower as her antenna site but amended to another site (Tr. 434). Following his conversations with Vander Sloot and Ms. Barrera, Smith testified that Doug Raab told him that "someone" wanted him to put it in writing (Tr. 612) so he sat down at Doug Raab's desk, at his typewriter, and typed out Barrera Exhibit 19, which stated that "at no time did the undersigned, nor any other representative of Grace Broadcasting of Texas, give permission to Aiada (sic) Barrera to locate her TV Antenna on the tower we are constructing in Bertram, Texas" (Barrera Ex. 19; Tr. 612). Ms. Smith attested that the statement was true and accurate at the time, and is accurate as of the date of the hearing (Tr. 627). Smith does not know Ms. Beck (Tr. 592, 613), and does not know if Raab gave the letter to Ms. Beck (Tr. 613). To the best of his knowledge, Smith never gave anyone representing Aida Barrera, or Aida

Barrera, permission to use the KIXS-FM antenna site, nor to his knowledge did anyone else representing Grace Broadcasting, Inc. (Tr. 580-581).

96. Vander Sloot testified that no one during the conversation of April 28 told him that Aida Barrera had specified the KIXS antenna site in her application (Tr., 656-657). He was unaware that the KIXS site had been specified until sometime in "July, August, September or October when [Vander Sloot] received a pleading in the mail from Neil Smith" (Tr. 657). At that point, in reviewing the pleading, Vander Sloot testified "that I was quoted many, many times of saying things that I had objected to and that I never said" (Tr. 657).

97. The testimony of Ms. Barrera and all her agents, and both Messrs. Smith and Vander Sloot, agree that at no time in any conversation did a representative of Barrera ever discuss the possible terms and conditions of a lease, such as the term, the monthly rental payment, etc. with a representative of Grace Broadcasting (Tr. 361, 443-444, 584, 658). As Vander Sloot testified, "There was no need to" (Tr. 658).

CONCLUSIONS

98. This proceeding concerns the respective applicants for a construction permit for a new television station in Killeen, Texas. It is well established that only basically qualified applicants are entitled to comparative consideration. *Louis Adelman*, 28 FCC 432 (1960), *recon. denied*, 29 FCC 1223 (1960), *aff' d sub nom. Guinan, et al v. FCC*, 297 F.2d 782 (D.C. Cir. 1961). It is, therefore, appropriate to address the qualifying issues specified against Barrera before considering the comparative strengths and weaknesses of the construction permit applicants.

ANTENNA SITE AVAILABILITY/MISREPRESENTATION

99. The essential facts are clear. Barrera's application filed April 22, 1986 specified the KIXS-FM tall tower owned by Grace Broadcasting as its antenna site. The record evidence establishes, however, that Barrera was never given permission to specify the site and, in fact, was specifically told by Gerald C. Vander Sloot, Grace Broadcasting's Vice President and Director of Engineering that she could not specify the tower as her antenna site.

100. Grace Broadcasting planned to erect a new tower for KIXS-FM following its purchase of the station. When Grace Broadcasting assumed ownership in January, 1986, it hired John Smith, a former owner of the station, as a Vice President. His responsibility was to oversee the lease of the land for the antenna site and to handle other on-site responsibilities. Vander Sloot's responsibilities was to handle all other details of tower construction including negotiating with the tower erector, Stainless, Inc., dealing with any technical issues concerning the tower; and, most important, dealing with any inquiries concerning tenants on the tower. Smith's instructions were to refer all inquiries concerning possible tower tenants to Vander Sloot.

101. Barrera initially sought permission to specify the tower from Smith. According to Smith he told Barrera and her legal representative that they would have to talk to Vander Sloop since rental of the tower was Vander Sloot's responsibility. According to Barrera, Smith gave her a "preliminary OK". Smith's version is more credible and is accepted. Smith's testimony is consistent with the scope of his and Vander Sloot's responsibilities; his lack of knowledge of any technical details of what was to go on the tower; and his subsequent surprise on learning after the fact that Barrera had specified the Grace Broadcasting tower in her application. Also, Smith's trial testimony is consistent with Ms. Barrera's declaration filed with her Opposition To Petition To Enlarge Issues (Barrera Ex. 5). Ms. Barrera stated in her declaration that Smith told her she needed to contact Vander Sloot because he (Smith) was not the person responsible for handling the matter. Finally, Smith is a disinterested witness and the Presiding Judge found him to be truthful and forthright.

102. Moreover, resolution of the conflict in testimony over Smith's conversations with Ms. Barrera and Bechtel, her legal representative is not critical to a resolution of the issues. Both Ms. Barrera and Bechtel understood they would have to obtain Vander Sloot's permission before Barrera could specify the KIXS tower as her antenna site. It is undisputed that Vander Sloot never gave his approval. Vander Sloot made clear that the payment of150,000 -200,000 for tower modification costs prior to the erection of the tower was a condition precedent to Grace Broadcasting's approval of Barrera's use of the site. When Barrera refused to meet this condition, Vander Sloot specifically denied permission to specify the KIXS tower as Barrera's antenna site.

103. Vander Sloot denied permission to specify the site on April 21, 1986, the day *before* Barrera's application was filed. Nothwithstanding and unbeknown to Grace Broadcasting and its representatives, Barrera's application specified the KIXS tower as her antenna site. As conceded by Barrera's own counsel, there can be no question that Barrera did not have "reasonable assurance" of the availability of her antenna site when she filed her application. At an absolute irreducible minimum, reasonable assurance means that the applicant has the permission of the site owner to specify the site. *Puopolo Communications, Inc.*, 60 RR 2d 964 (Rev. Bd. 1986); *National Innovative Programming Network, Inc. of The East Coast*, 2 FCC Rcd. 5641, 5643 (1987); see also *Dutchess Communications, Inc.*, 101 FCC 2d 243 (Rev. Bd. 1985).

104. Barrera's failure to specify a viable antenna site compels denial of her application. The Commission has made clear that an applicant lacking reasonable assurance of the availability of an antenna site at the time the application was filed *will not* be permitted to amend to a new site thereafter. *Classic Vision, Inc.*, 104 FCC 2d 1271, 60 RR 2d 1681 (Rev. Bd. 1986), *Further Appeal of ALJ's Order Dismissed*, 61 RR 2d 1408, is directly on point, in that it involved a case where an applicant conceded that it had:

> no understanding with the owner of the [transmitter] site specified in its application. That fatal admission by [applicant] establishes that it is not a basically qualified applicant, and hence could not ultimately prevail in this proceeding, since the law is clear that "an applicant will not be permitted to amend where it did not have the requisite reasonable assurance to begin with . . . " *South Florida Broadcasting Co.*, 99 FCC 2d 840, 845, 57 Rad. Reg. 2d (P&F) 495, 499 n. 12 (1984).

See also *George Edward Gunther*, 104 FCC 2d 1363, 60 RR 2d 1662 (Rev. Bd. 1986); *Mary Ann S. Bohi*, FCC 86R-21, 59 RR 2d 1686 (Rev. Bd. 1986).

105. Barrera, in her conclusions, argues that it is not relevant whether she had reasonable assurance of the availability of her antenna site at the time the application was filed because under sections 73.3522 and 73.3572(b) of the Commission's rules she could file an amendment as of right specifying a new antenna site at any time prior to the "B" cut-off date. Barrera further argues that since she filed an amendment specifying a new antenna site prior to the B-cut-off date, she could not be held to be technically unqualified. Stripped of its legal niceties, Barrera is arguing that if an applicant specifies an antenna site without any reasonable assurance of its availability and the applicant is successful in concealing that fact until the B cut-off when the applicant specifies a new site, the Commission must overlook the original gross technical deficiency and misrepresentation and accept the amendment specifying a new site.

106. Barrera's contention is rejected for a number of reasons. First, to allow Barrera to profit from its deception offends the public conscience and is, therefore, contrary to the public interest. In addition, Barrera's contention is completely at odds with the cases cited *above* holding that an applicant who does not have reasonable assurance of its antenna site when its application is filed may not later amend to another site. There is no reason to treat a patently defective applicant differently simply because it amends to another site prior to the B-cut off date rather than at a later date.

107. Further, to credit Barrera's argument would make a mockery of the cut-off rules, which are designed to promote administrative finality by requiring that *substantially complete* applications are filed by the cut-off date so that the Commission staff and other applicants are not forced to wait while unqualified applicants substantially amend their application to meet basic minimal requirements. As pointed out by the Commission in *Dutchess Communications Corp.*, 58 RR 2d 381, 390 (Rev. Bd. 1985), the first principal of the comparative process " . . . is that those filing an application for a broadcast construction permit be ready, willing and able to construct." Also, to accept Barrera's argument would make a mockery of the Commission's site certification requirements, particularly since the Commission amended its application form to include a site certification to preclude these sorts of abuses. *See* , *Alden Communications Corp.*, 2 FCC Rcd. 3462, 3463 (Rev. Bd. 1987). The site certification sheet was added to the application, even though it was essentially surplus, to prevent precisely the sort of abuse perpetrated by Barrera here.

108. Moreover, Barrera does not accurately state the law. Barrera is correct that TV applicants, with substantially complete applications may amend as of right prior to the "B" cut-off date. *See* , *e. g.*, *James River Broadcasting Corp.*, 399 F.2d 581, 13 RR 2d 1088 (D.C. Cir. 1968). However, it is also true that applicants with substantially incomplete applications may not be amended as of right prior to the "B" cut-off. *Henry M. Lesher*, 67 FCC 2d 278, 41 RR 2d 1593 (1977) (FCC dismisses application and rejects amendment filed as of right because application was not substantially complete when filed on cut-off). Section 73.3564(a) of the Commission Rules provide that "applications that are not substantially complete will be returned to the applicant." Moreover, Section 73.3564(b) of the Commission's rules specifically notes, "such acceptance (of an application for filing) will not preclude the subsequent dismissal of the application if it is found to be *patently not in accordance with the FCC's rules.* " Section 73.3566(a) of the Commission's rules provides in pertinent part:

> that applications which are determined to be patently not in accordance with the FCC's rules, regulations or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective, and will not be accepted for filing or, if inadvertently accepted for filing, will be dismissed.

109. The Commission has, accordingly, repeatedly held that an application which is not substantially complete and which is patently defective on the cut-off date may not be amended. "Commission policy has consistently required that, where a cut-off period is established, applications must be submitted in a substantially complete form before the cut-off date to be entitled to comparative consideration. As a corollary of that policy, curative amendments submitted after the cut-off date generally have not justified reinstatement of an application that was not substantially complete as of the original date of filing; . . . " *Advance, Inc.*, 88 FCC 2d 100, 50 RR 2d 612, 617 (1981), *recon. denied*, 89 FCC 2d 177 (1982).

110. There is no question that applications specifying antenna sites for which they do not have reasonable assurance are "substantially incomplete" and "patently defective" as those terms are used in sections 73.3564 and 73.3566. For example, in *Colorado Television, Inc.*, 56 RR 2d 1080, 1082 (Rev. Bd. 1984), *rev. denied*, FCC 85-437 (rel. August 6, 1985), the Commission stated that:

> Central to this discussion is whether [applicant] had specified a viable antenna site at the time its application was denied; otherwise, its application was substantially incomplete and patently not in compliance with the Commission rules, and [applicant] would be technically unqualified to be a Commission licensee.

Again, in *Houston Family Television, Ltd.*, 101 FCC 2d 661, 58 RR 2d 1557, 1559 (Rev. Bd. 1985) the Commission stated that: "the application is now substantially incomplete and patently defective since its lacks a viable transmitter site." Accordingly, since Barrera's application was substantially incomplete and patently defective when filed, and since it was only accepted for filing because of Barrera's misrepresentation, Barrera had no right to file a curative amendment. Barrera is, therefore, technically unqualified to be a licensee and its application must be denied.

111. Barrera also suggests that *Anax Broadcasting, Inc.*, 87 FCC 2d 843, 49 RR 2d 1589 (1981) precludes the Presiding Officer from making the finding that Barrera is technically unqualified on the basis of the fact that the staff accepted Barrera's amendment in accordance with Section 73.3522 of the Commission's rules. Barrera is wrong. *Anax* stands only for the proposition that an issue which is considered by the staff and addressed in the *Hearing Designation Order* may not be reconsidered by the Presiding Officer. That is clearly not the case here. The issue of Barrera's antenna site representations was not addressed in the *Hearing Designation Order* in this proceeding. There is, therefore, no bar to its consideration in this proceeding and to the denial of Barrera's application.

112. As discussed above, the record evidence establishes that Barrera did not have reasonable assurance of the availability of her specified antenna site when her application was filed. The record evidence requires the further conclusion that Barrera engaged in a pattern of deliberate misrepresentations and lack of candor in order to conceal the fact that she did not have a viable antenna site. Such misconduct provides a separate and independent ground for disqualifying Barrera.

113. The Commission and the Courts have emphasized that this agency's scheme of regulations is premised on the Commission's ability to depend upon the accuracy and truthfulness of the representations of its prospective licenses and that applicants have an affirmative duty to inform the Commission of the facts the Commission needs to know in order to fulfill its statutory mandate. *RKO General Inc. v. FCC.*, 670 F.2d 215, 232 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982).

114. The materiality of an applicant's representations concerning its antenna site is clear. Filing a broadcast application without "an antenna site, a technical keystone of the broadcast operation . . . " *South Florida Broadcasting Co., supra*, 99 FCC 2d at 842, 57 RR 2d at 497, "frustrates ready applicants and the Commission's processing systems." *Report and Order in MM Docket No. 84 - 750 (FM Application Processing)*, FCC 85-125, 58 Rad. Reg. 2d (P&F) 776, 782 (1985). The applicant's obligation to be candid with the Commission is even more important now, when the FCC relies so much on certifications rather than requiring underlying documentation.

> The Commission must rely on the absolute candor of applicants -- more so now than ever because our license application forms rely increasingly on bare representations and less on documentations.

Superior Broadcasting of California, Inc., 94 FCC 2d 904, 54 RR 2d 773, 776- 777 (Rev. Bd. 1983). A misrepresentation involves a false statement of objective fact made to deceive. *Fox River Broadcasting Co., Inc.*, 88 FCC 2d 1132, 1136-1138, 50 RR 2d 1321, 1324 (Rev. Bd. 1982), *modified*, 93 FCC 2d 127, 53 Rad. Reg. 2d (P&F) 44 (1983). "Lack of candor involves a failure of a licensee to be scrupulous in providing complete and meaningful information provided for in form." *Fox River Broadcasting, supra*, 50 RR 2d at 1325, quoting *Lorrain Journal v. FCC*, 351 Fed. 2d 824, 830 (D.C. Cir. 1965). The Commission has made clear that an application's disqualifying lack of candor may consist of a failure to inform the Commission about decisionally significant information concerning its antenna site. *See , e. g., Valley FM Radio*, 99 FCC 2d 924, 57 RR 2d 420 (Rev. Bd. 1984); *cf. Cannon Communications Corporation, supra* ; *Dutchess Coimmunications Corp., supra*. The Commission has noted that false certifications are abuses of the Commission's processes which waste the resources of both the Commission and legitimate qualified applicants, which may not only break Commission rules, see CFR Section 1015, but may subject the applicant to a monetary forfeitures under 47 U.S.C. Ssections 502 and 503, as well as criminal liability under 18 U.S.C. Section 1001. *In the Matter of Financial Certifications by Applicants for Broadcast Station Permits*, FCC No. 87-97 (March 19, 1987).

115. Barrera's application contained a number of false statements of fact. Barrera falsely certified that it had reasonable assurance of the availability of the KIXS-FM tower as its antenna site. The site certification also falsely listed John Smith as the source of the applicant's reasonable assurance. Finally, Barrera's application contained an Engineering Statement, submitted under affidavit, which falsely represented that "KIXS-FM has agreed to permit the applicant to specify the side-mounting of the proposed antenna on this structure." These false statements of fact were made to deceive the Commission by concealing the fact that Barrera did not have a viable antenna site. Denial of its application is mandated by the cited case precedent.

116. Barrera argues that it did not intend to deceive the Commission concerning the status of its antenna site. It urges that the insertion of the phrase "negotiations in process" in the site certification page shows that Barrera acted in good faith. Barrera's protestations of innocent intent are not supported by the weight of evidence and are rejected.

117. Barrera's claim of innocent intent can not be reconciled with its affirmative representation that it had reasonable assurance of the availability of the KIXS-FM tower for its antenna site, a fact which it knew was not true. Nor can it be reconciled with Barrera's engineering statement representing that Grace Broadcasting had agreed to permit her to specify the KIXS-FM tower when, in fact, Vander Sloot had expressly stated she could not. Moreover, rather than assisting Barrera, the findings establish that the insertion of the phrase "negotiations in process" was a further false statement of fact. The findings make abundantly clear no negotiations were taking place when the application was filed. Vander Sloot had made a non-negotiable demand which Barrera first had to meet before there could be any discussions of the terms and conditions for use of the KIXS-FM tower. Since Barrera had decided not to meet Vander Sloot's pre-condition, discussions for use of the site were never begun. Thus, the phrase "neogiations in process" was a lawyers' invention and its insertion was nothing more than a strategy of concealment designed "to avoid problems down the line."

118. Barrera also urges there was no intent to deceive the Commission because there was no risk involved in filing an application without reasonable assurance of an antenna site as long as the Commission was informed of the fact. Barrera's actions at the time she filed her application exposes the falsity of this claim. If Barrera was as sanguine as she now claims why did she misrepresent the availability of an antenna site? If she truly believed it made no difference, it is reasonable to assume she would have candidly disclosed to the Commission her inability to gain Grace Broadcasting's permission to use their antenna site. Also, if it made no difference, why the reluctance to call Vander Sloot *before* the application was filed. Contrary to Barrera's assertion, the findings make clear that Barrera was very concerned that her application would be rejected for lack of an antenna site. Her resorting to a strategy of concealment, rather a full and candid disclosure of the facts, best expresses the extent of her concern. Moreover, Barrera's concern is understandable in light of Commission precedent decided before Barrera's application was filed, holding that an applicant could not amend its application if it did not have reasonable assurance at the outset. *See South Florida, supra*. Barrera's contention, first raised at the hearing, demonstrates her unwillingness to be candid and forthcoming even at this late date.

119. Barrera further argues that there is no evidence the Commission was misled by the misrepresentations in her application. Whether or not the Commission was misled does not excuse Barrera's misconduct. Further, there is ample evidence the Commission was misled and its "processes adversely effected" by Barrera's filing of its application without a technically viable proposal. The acceptance of Barrera's application, its inclusion on the B-cut off list, and the processing of Barrera's application when she had no antenna site and no technically valid engineering proposal demonstrates that fact.

120. Barrera urges that her inclusion of the caveat "negotiations in process," which, as pointed out above was a false statement, should have communicated to the Commission that she did not have reasonable assurance of her site. Barrera overlooks the fact that she also affirmatively represented that she had reasonable assurance and included an entire and completed engineering portion, despite Commission precedent which has long held that filing a technical proposal in an application was an implied representation of reasonable assurance. In point of fact, every representation made by Barrerea would lead an objective observer, including the Commission's processing staff, to conclude that Barrera had reasonable assurance for her site and that her technical proposal was viable, precisely the result for which Barrera's representations were crafted.

121. Moreover, Barrera's transgressions did not end with the filing of her application. On April 28, 1986, Vander Sloot reiterated his refusal to budge from his position that the150-200,000 had to be paid up-front so the tower could be modified prior to its erection to accommodate Barrera. Barrera at that point gave up any remaining hope of using the KIXS-FM tower and decided to obtain a new antenna site. However, Barrera did not inform the Commission she was no longer specifying the antenna site denoted in her application. Barrera concealed that material fact from the Commission until a new site was specified in Barrera's B-cut off amendment filed on June 5, 1986.

122. Barrera, moreover, cannot elude responsibility for her misrepresentations by relying on the fact that she was assisted by attorneys in preparing and filing her application. The representation at issue were neither complex nor difficult to understand. Ms. Barrera admirably defined "reasonable assurance" as " . . . permission that you obtained from someone . . . to rent space on a tower." Ms. Barrera knew, after her telephone conversation with Ms. Sadowsky, that the person she had been told must give that permission, Vander Sloot, had denied it. Ms. Barrera also knew that she had no intention of complying with the condition that Vander Sloot had twice stated to her representatives was an essential pre-condition to that permission. However, although Barrera knew that she did not have permission to use the KIXS-FM tower, she certified she had reasonable assurance of its availability. Further, she had full knowledge of and authorized the insertion of the phrase "negotiations in process" in the certification page which was designed to further the strategy of concealment. Ms. Barrera claims, rightly, to be a sophisticated and worldly professional, not an innocent, and she cannot be relieved of responsibility for the course of deception of which she was fully informed and which she fully approved.

COMPARATIVE ISSUE

123. Under the diversification criterion, neither 62 Broadcasting nor Barrera have an advantage since neither has any cognizable media interests. Barrera urges that 62 Broadcasting should receive a demerit because Mrs. Beck's emancipated daughter, Mrs. Beard formerly owned a construction permit for a low power television station in Temple, Texas.[6] The contention is rejected. Barrera has not cited and the Presiding Judge is unaware of any precedent supporting Barrera. Further, the Commission has specifically held that the media interests of a family member are not imputed to other family members in the absence of a *prima facie* showing that such family member is a real party in interest. *Thomas and Essie Collins*, 93 FCC 2d 467 (Rev. Bd. 1983); *Cannon's Point Broadcasting Co.* 93 FCC 2d 643 (Rev. Bd. 1983). The required showing has not been made in this case.

124. Both applicants propose and are entitled to 100% full-time integration credit. Barrera's claim that 62 Broadcasting's proposal is a "sham" and that Mr. Beck is in control is rejected. Barrera's contention rests solely on speculation. Barrera has not offered any evidence which suggests that Mr. Beck has controlled anything having to do with 62 Broadcasting's application. The unrebutted evidence shows that the shareholders of 62 Broadcasting have been solely responsible for planning and prosecuting the application. There is no evidence in the record showing that Mr. Beck was ever involved in any way in the prosecution of the application; that he attended any meetings of the shareholders or principals; that he spoke with any of 62 Broadcasting's engineering or legal consultants; or that Mr. Beck was involved in any aspect of application prosecution. To discount 62 Broadcasting's quantitative integration credit would require the Presiding Judge to indulge in speculation and surmise and make findings directly contrary to the unrebutted record evidence. 62 Broadcasting's integration proposal will be fully credited.

125. Both 62 Broadcasting's and Barrera's quantitative proposals are qualitatively enhanced. 62 Broadcasting is further enhanced by its 49% minority ownership and 51% female ownership. Also, 62 Broadcasting's principals are entitled to enhancement for long time local residence and substantial civic involvement. Barrera's proposal is enhanced by her status as an Hispanic minority and female. Barrera's residence in Jolleyville qualifies under the local residence criterion because it is within the service area. However, because her residence is some 65 miles from Killeen and so different that it is considered a different television market, Barrera's credit for local residence is somewhat diminished. Barrera is also entitled to minor enhancement credit under the civic participation criterion. Most of Barrera's activities for which she claims credit have been professional activities which were either remunerative paid involvements or designed to further her professional career. Furthermore, much of Barrera's professional and non-professional activities are not in any way tied to the service area, much less the community of Killeen. Barrera is also entitled to credit for her broadcast experience. Barrera and 62 Broadcasting are rated equal under the above integration criteria.

126. 62 Broadcasting enjoys a clear superiority under the comparative coverage criterion. 62 Broadcasting's provision of a first service (3,408 people) and a second service (810 people) warrants a clear and decisive comparative victory . *FBC, Inc.*, 95 FCC 2d 256, 259-262 (Rev. Bd. 1983); *Washoe Shoshone Broadcasting*, FCC 88R-30, re-

leased June 13, 1988, paragraph 53. Thus, even *assuming arguendo*, Barrera was deemed to possess the requisite qualifications, the public interest would still require the grant of 62 Broadcasting's application under applicable comparative criteria.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or its is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of 62 Broadcasting, Inc. for a construction permit IS GRANTED; and the application of Aida Barrera IS DENIED.[7]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] The application of a third applicant, Excelsior Communications, Inc., was dismissed at the applicant's request. *See , Order*, FCC 86M-3610 (released December 12, 1986).

[2] All of the figures shown with the exception of the footnoted items are based on Figure 5 of Joint Exhibit 1. The footnoted figures are based upon Barrera's December 16, 1986 post "B cut-off" amendment. *See* Barrera Exhibit 2, Figure 5 rejected at Tr. 19. See also Tr. 78-79. The Presiding Judge agrees with the Bureau that it is appropriate to use the lesser figures from Barrera's "B cut-off" and post "B cut-off" amendments with respect to areas and populations and service to underserved areas since they represent the "worst possible case" scenario. *See Women Broadcasting Coalition*, 59 RR 2d 730 (1986).

[3] See footnote 2 above.

[4] See footnote 3.

[5] See footnote 2.

[6] 62 Broadcasting notes in its Reply that the construction permit expired on April 29, 1987 and no application for extension or reinstatement of the application has been filed.

[7] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN SATELLITE COMPANY — File No. CSG-88-022-P/L

Application for authority to construct an international earth station at Camarillo, California,) for provision of INTELSAT Business Services

ORDER AND AUTHORIZATION

Adopted: June 30, 1988; Released: July 18, 1988

By the Chief, International Facilities Division:

1. The Commission is considering an application filed on February 1, 1988, and amended on April 19, 1988, by American Satellite Company (ASC), requesting authority pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities at Camarillo, California, for provision of INTELSAT Business Services (IBS). The application was placed on public notice on February 17, 1988. No comments were received. The applicant has been granted blanket authority to establish and operate channels of communication between the U.S. and various overseas points for provision of IBS services.[1]

2. The proposed earth station will consist of a 6.1 meter antenna which conforms with INTELSAT Standard F-1 technical parameters communicating with appropriate INTELSAT Pacific Ocean Region (POR) satellites in the 4/6 GHz band. The earth station will be constructed at Camarillo, California, on customer premises and will be used to provide a full range of IBS services.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the U.S. as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them.[3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

4. ASC has the legal, technical and financial qualifications to construct and operate the proposed earth station. ASC is a common carrier pursuant to the Communications Act of 1934, as amended, and provides various international services. The proposed earth station complies with INTELSAT Standard F-1 technical parameters for IBS stations. ASC has completed the necessary frequency coordination.

5. The scope of the operation of the proposed station will be the same as that permitted by the Commission in previous IBS authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as a multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

6. Upon consideration of the application, we find that authorization of the requested services and facilities is required by the public convenience and necessity.

7. Accordingly, IT IS ORDERED pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-88-022-P/L IS GRANTED, and ASC is authorized to construct and operate the proposed earth station at Camarillo, California, to provide IBS and related digital video services.[5] Before the completion of equipment installation and facility activation, however, the applicant shall provide the Commission with a summary of equipment which was actually installed.

8. Temporary authority (TAO-1430) issued by the Commission on February 11, 1988, is hereby terminated effective upon release of this order.

9. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* American Telephone and Telegraph Company, *et al.*, Mimeo No. 3220, released March 18, 1985, File No. I-T-C-85-035 *et al.*

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the facilities authorized for provision of IBS or television services to these services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* the cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327, (released March 25, 1986).

[5] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 83-1376

In the Matter of

Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands — RM 4436

ORDER

Adopted: July 8, 1988 **Released: July 21, 1988**

By the Commission:

1. On June 13, 1988, the National Association of Regulatory Utility Commissioners, pursuant to Section 410(c) of the Communications Act,[1] nominated The Honorable William E. Long, Chairman of the Michigan Public Service Commission, to serve as a member of the Joint Board in CC Docket No. 83-1376.[2] A vacancy on the Joint Board has occurred as a result of the departure of The Honorable Edward F. Burke of Rhode Island.

2. Pursuant to Section 410(c) of the Communications Act, we hereby appoint the following state commissioner to serve as a member of the Joint Board established in CC Docket No. 83-1376 in lieu of Edward F. Burke:

The Honorable William E. Long
Chairman
Michigan Public Service Commission
Mercantile Building, 6545 Mercantile Way
Post Office Box 30221
Lansing, Michigan 48909
(513) 334-6368

3. Accordingly, IT IS ORDERED that the Honorable William E. Long IS APPOINTED as a state member of the Joint Board in CC Docket 83-1376.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] 47 U.S.C. § 410(c) (1985).

[2] *See* letter from Paul Rodgers, General Counsel, National Association of Regulatory Utility Commissioners, to Dennis R. Patrick, Chairman, Federal Communications Commission, dated June 13, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286
CC Docket No. 78-72

In the Matter of

Amendment of Part 67
of the Commission's Rules
and Establishment of a
Joint Board

MTS and WATS Market Structure

ORDER

Adopted: July 8, 1988 **Released: July 21, 1988**

By the Commission:

1. On June 13, 1988, the National Association of Regulatory Utility Commissioners, pursuant to Section 410(c) of the Communications Act,[1] nominated the Honorable James M. Fischer, Commissioner on the Missouri Public Service Commission, to serve as a member of the Joint Board in CC Docket No. 80-286.[2] A vacancy on the Joint Board has occurred as a result of the departure of The Honorable Edward F. Burke of Rhode Island.

2. Pursuant to Section 410(c) of the Communications Act, we hereby appoint the following state commissioner to serve as a member of the Joint Board established in CC Docket No. 80-286 in lieu of Edward F. Burke:

The Honorable James M. Fischer
Commissioner
Missouri Public Service Commission
Post Office Box 360
Truman State Office Building
Jefferson City, Missouri 65102
Area Code (314) 751-3233

3. Accordingly, IT IS ORDERED that the Honorable James M. Fischer IS APPOINTED as a state member of the Joint Board in CC Docket 80-286.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] 47 U.S.C. § 410(c) (1985).

[2] *See* letter from Paul Rodgers, General Counsel, National Association of Regulatory Utility Commissioners, to Dennis R. Patrick, Chairman, Federal Communications Commission, dated June 13, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-255

In the Matter of

BELL ATLANTIC TELEPHONE COMPANIES — Transmittal No. 172

Revisions to Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 1988; Released: July 22, 1988

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. This investigation addresses the cost methodology and costs that the Bell Atlantic Telephone Companies (Bell Atlantic) used to calculate rates for operator services known as line status verification (verification)[1] and call interruption (interruption).[2] On March 2, 1987, we granted Bell Atlantic a waiver of Sections 69.4, 69.111, and 69.112 of the Commission's Rules, 47 C.F.R. §§ 69.4, 69.111, 69.112, to permit it to establish a separate rate element for these two operator services. [3] Bell Atlantic then filed Transmittal No. 172, proposing to establish rates to recover from interexchange carriers the costs associated with verification and interruption.[4]

2. In an Order released July 14, 1987, this Bureau designated issues for investigation but did not suspend the tariff revisions.[5] The *Designation Order* sought to clarify: (1) the methodology Bell Atlantic used to derive rates for these operator services; (2) the method Bell Atlantic used to derive direct and indirect costs; (3) the method it used to determine demand for these services; (4) why Bell Atlantic used a single rate for both services; and (5) the weighting factors it used to allocate costs for these services between interstate and intrastate categories. Bell Atlantic submitted its direct case on August 14, 1987 (Direct Case). MCI Telecommunications Corporation (MCI) filed an opposition on September 14, 1987 (MCI Comments), and Bell Atlantic filed a reply on September 18, 1987 (Reply).

3. In this Order, we discuss issues related to costs and cost methodology first,[6] followed by a discussion of Bell Atlantic's demand estimates. We then discuss the use of a single rate for both services and finally the segregation of costs.

II. DISCUSSION

A. *Costs and Methodology*

1. Investigation Issue; Pleadings

4. Issue 1(a) of the *Designation Order* directed Bell Atlantic to describe the methodology it used to develop the rates proposed for verification and interruption, to describe in detail the study it used to determine operator services costs, and to explain why the proposed rates were not based on average operator costs. Issue 2(a) directed Bell Atlantic to describe fully the direct and indirect costs associated with verification and interruption. *Designation Order*, 2 FCC Rcd at 4247.

5. Bell Atlantic states in its direct case that it set the rate for verification and interruption at.70 per verification or interruption because (1) this rate would permit it to recover its weighted direct costs; (2) it would contribute to indirect costs and rate of return; and (3) it would reduce customer confusion because the same rate applies for intrastate verification.[7] In Transmittal 172, Bell Atlantic claimed that the cost in both Delaware and Pennsylvania was.62 per verification or interruption, but it provided no cost breakdown. Transmittal D&J at 4. In its direct case, Bell Atlantic supplies new data showing a cost of.72 per operation but does not reconcile this information with the original cost data. Direct Case, App. at 10.

6. With its direct case, Bell Atlantic supplies three work- papers containing its cost figures. Workpaper 1 shows direct costs, which include operator salaries, equipment, land, and building costs associated with the operators. Workpaper 2 computes the fully loaded cost of.72 for these services, and Workpaper 3 shows the derivation of the operator-related and investment-related indirect cost factors. Bell Atlantic claims that it computed the figures in Workpaper 2 by applying the appropriate loading factors to the personnel-related and investment-related components of the direct costs. Direct Case, App. at 9-10. The fully-loaded costs are shown as.61 for verification and.9631 for interruption. Weighting these costs by the relative demand for each service, Bell Atlantic computes a weighted cost of.72 for both services. Bell Atlantic's Workpaper 1 shows a unit cost per operation work second of.0137, direct costs of .5206 per verification, and direct coss of.822 per interruption. Bell Atlantic explains that Workpaper 1, Column A, shows the annual costs associated with operator services labor rates, based on Bell of Pennsylvania and Diamond State costs, and investment-related expenses, based on its Traffic Operator Position System (TOPS). Column B shows the work second volumes based on AT&T historical actuals and Column C shows the development of the cost per work second. Direct Case, App. at 8.

7. MCI claims that Bell Atlantic has not complied with the Bureau's directive to explain what costs are included in the category of indirect costs, and that it is not possible to determine whether Bell Atlantic's estimates are correct because it does not provide work tables for its average direct costs. MCI Comments at 2-3. MCI asserts that Bell Atlantic's Workpaper 1 labels as direct costs items which may represent indirect costs, including miscellaneous operator-related expenses and undefined facilities expenses. *Id.* at 4. It asks for a more complete disaggregation of these costs. Bell Atlantic replies that the miscellaneous

expenses represent operator training expenses and other related operator office expenditures which are direct costs. Reply at 2.

8. MCI believes that some of the investment-related expenses shown on Workpaper 1 may not represent the actual costs of providing these operator services but rather the amounts which Bell Atlantic previously paid American Telephone and Telegraph Company (AT&T) for operator services under special contract. MCI Comments at 4-5.[8] MCI claims that these historical costs may be unreliable because the contract expenses may be calculated in a manner that provides an average, levelized charge for all operator service functions. *Id.* at 5. If this is so, MCI posits, services which do not contribute significantly to peak usage bear a disproportionate share of the stated expense. *Id.* Bell Atlantic reiterates that the costs shown are its own, and that its cost factors are based on labor rates reported by Bell of Pennsylvania. and Diamond State operator services, and the investment-related expenses of TOPS. Reply at 3.

9. Bell Atlantic further claims that it based its direct costs on average operator costs expressed in cents per work second. Direct Case, App. at 1. Bell Atlantic states that it used AT&T's "TSPS Standard Work Seconds Tables" (TSPS Tables or Tables) to estimate the operator times necessary to perform each function. *Id.* at 8. Bell Atlantic explains that by using the Tables, it developed these estimates from the activity steps involved in each function. *Id. at 9.* Based on the Tables, Bell Atlantic estimated the basic operator connection time for a non-coin operator call to be 25 seconds. Bell Atlantic adds 13 seconds for the verification, resulting in a total of 38 seconds. *Id.* Similarly, it arrives at 60 seconds per interruption by adding 25 seconds for the basic call operation and 35 seconds for the interruption operation. Bell Atlantic asserts that it knows of no better source or analysis of operator work time than the industry standard tables upon which it relied. Further, it observes that it is taking back the same operators who performed these functions for AT&T and thus has no reason to assume that AT&T's reported operator work times would not be representative of its own. *Id.*

10. MCI claims that if Bell Atlantic's estimate of 25 seconds for a basic call operation represents the average time required to perform *all* operator services, then that figure already reflects the time required to perform verification and interruption. MCI Comments at 3. It submits that using a cumulative approach to calculate the actual times required produces a higher cost figure by double counting that time. MCI suggests that Bell Atlantic provide detailed information about its costing methodology and include the TSPS Tables on which it relied. MCI Comments at 4. Bell Atlantic responds that the 25-second figure for operator work time does not include higher level operator activities such as verification and interruption. Reply at 2. Bell Atlantic states that it correctly applied the special additive time factors for verification and interruption in developing its cumulative work time estimates.

11. MCI further argues that Bell Atlantic fails to address the discrepancies between cost figures contained in its transmittal and its direct case. MCI Comments at 2-3. MCI complains that Bell Atlantic's documents provide no useful or auditable data, that Bell Atlantic does not explain its cost factors, and that the source materials are identified but not provided. *Id.* at 6. MCI contends that it cannot determine whether Bell Atlantic chose factors for its indirect cost calculations simply to justify a pre-determined result. *Id.* at 7. Bell Atlantic responds by providing further information on the basic inputs it used in calculating the operator related indirect cost factor and the investment related factors. Reply, App. A and B.

2. Discussion and Conclusion

12. We conclude that Bell Atlantic's methodology for developing rates is sufficiently accurate to justify an initial rate for these services. Bell Atlantic has explained the method by which it derived average costs and has described the data on which it relied. Bell Atlantic defends its rate of.70 by claiming that the rate will recover its weighted direct and indirect costs. Therefore, we conclude that Bell Atlantic has provided information which sufficiently demonstrates that it based its rates on average operator costs. Bell Atlantic states that it is aware of no better source of operator work time than the industry standard tables on which it relied, and we agree. Further, we agree with Bell Atlantic that there is no reason to assume that AT&T's reports of operator work time are not representative of Bell Atlantic's experience, particularly since Bell Atlantic will employ the same operators who performed these functions at AT&T. Bell Atlantic states that it computed direct and indirect costs by applying the appropriate loading factors to the personnel-related and investment-related components of the direct costs; the fully-loaded costs total approximately.72.[9] It computes indirect costs similarly resulting in a total of.72.

B. ***Demand Forecast***

1. Investigation Issue; Pleadings

13. Issue 1(b) requested Bell Atlantic to describe the methods it used to determine demand for verification and interruption.

14. Bell Atlantic claims that it developed the demand forecast for verification and interruption based on the actual volumes of interstate verifications and interruptions performed by AT&T operators in 1986 prior to operator take-back. *See* D&J at 6-7. It states that its source was Form 7000, a report which AT&T provided to Bell of Pa. on a monthly basis. Direct Case, App. at 2. It asserts that AT&T's Form 7000 contains call counts by type of operator function, based on a monthly sample of 3000 calls, and a factor to convert the sample values into universe values.[10] Bell Atlantic states that it derived total demand by multiplying the sample counts for interruption and verification by the factors supplied by AT&T. *Id.* at 2-3.

15. Bell Atlantic explains that the demand counts were most useful for establishing the proportion of verification to interruption requests when it developed a weighted average direct cost. *Id.* at 3. It claims that changes in demand for verification and interruption from 1986 to the present would not cause changes in the rates, assuming that the relative split of interruptions to verifications does not change significantly. Bell Atlantic asserts that changes in demand would simply lead to proportional changes in costs because costs were developed based on actual average operator costs per minute for each function. *Id.* at 3-4. It states that the customer usually requests interruption after verification confirms that the telephone is in operation. *Id.* at 4. Thus, Bell Atlantic reasons that it had no

cause to presume any change in the relative demand for the two services from that reported by AT&T's Form 7000.

16. Bell Atlantic further states that for intraLATA usage, the Form 7000 provides separate demand for verification and interruption, but for interLATA usage the form provides only combined demand. *Id.* at 2. Bell Atlantic asserts that it then uses the intraLATA data to apportion interLATA demand between verification and interruption. *Id.* at 2-3. It further divides the intraLATA portion between interstate and intrastate, but does not split the interLATA portion between Delaware and Pennsylvania. *Id.* at 3. Bell Atlantic assumes that the jurisdictional distribution of the interLATA services would be the same as the jurisdictional split of interLATA switched access traffic in general. It believes that this assumption is reasonable because the need to verify line status or interrupt calls should not differ materially by jurisdiction. Bell Atlantic obtains actual interruption and verification counts for the first nine months of 1986 from the Form 7000. Bell Atlantic annualizes these and uses the result as the forecast for 1987. *Id.* at 3.[11]

17. MCI states that it is confused by Bell Atlantic's description of the methods it used to determine demand. MCI Comments at 7. MCI submits that if information is available on the actual volume of interstate verifications and interruptions, then it was not necessary for Bell Atlantic to use this complex approach. MCI asserts that if actual data exist, Bell Atlantic should explain how the results of its demand study correspond to the actual usage data. *Id.* at 8.

2. Discussion and Conclusion

18. We conclude that the method Bell Atlantic used to determine demand is reasonable. Although the Form 7000 has not been made part of the record in this proceeding, Bell Atlantic claims that the AT&T form gives it actual data for the year immediately preceding its calculations, and that it annualizes these data for its forecast. One problem that arises from this approach is that the data provide figures for intraLATA operator services rather than interLATA services. We believe, however, that Bell Atlantic reasonably solved this problem by assuming that the distribution of the interLATA services between Delaware and Pennsylvania would be the same as the jurisdictional split of interLATA switched access traffic in general. On balance, however, we find no reason why Bell Atlantic should not use these figures and conversion factors supplied by AT&T.

C. *Separate Rates for Each Service*

1. Investigation Issue; Pleadings

19. Issue 1(c) of the *Designation Order* directed Bell Atlantic to explain why it did not propose separate interstate rates for each service, considering that it establishes separate rates for these services in intrastate tariffs.

20. Bell Atlantic states that it uses a single rate element because it cannot distinguish between verification and interruption requests on an interstate basis. Direct Case, App. at 5. It explains that when Bell of Pennsylvania performs these operator services on an intrastate basis, it is in direct contact with the originating customer, and its billing records permit it to distinguish between verification and interruption. By contrast, when the interexchange carrier performs these services, only the interexchange carrier has contact. This contact occurs only at the terminating end of the call, which does not permit identification of the two types of services.

21. Further, Bell Atlantic notes that it cannot obtain data which distinguish these services from its present recording system. Bell Atlantic observes that the Automatic Message Accounting (AMA) record generated by the intrastate call identifies requests with separate codes for verification and interruption, which permits separate billing for each service. *Id.* at 5. The AMA recording for interstate operator services, however, does not differentiate between verification and interruption, and does not identify the interexchange carrier requesting such services. *Id.* at 6. Bell Atlantic claims that it requested such capability from its equipment manufacturer, and pursued the issue for several months during 1986, but its current system cannot provide this information. Bell Atlantic asserts that it has no information as to when such a capability will become available. Instead, Bell Atlantic uses an automated "peg count" process to register incoming requests for verification from an interexchange carrier operator. This peg count provides the total number of verification requests, but does not determine the number of verification requests that evolve into requests for call interruption. *Id.* at 6-7. Bell Atlantic proposes a composite rate element for both services until the AMA capability can provide detail on both types of calls. *Id.* at 7.

22. MCI argues that Bell Atlantic's description of the functional differences between the handling of intraLATA and interLATA call requests does not appear to be correct. MCI Comments at 8. MCI alleges that Bell Atlantic fails to demonstrate why a local call placed over feature group facilities would be handled differently by the local exchange carrier (LEC) or why it would complicate the recording and billing process. It claims that a Bell Atlantic operator perceives no difference between an incoming call that originates from a local exchange customer line or from a Feature Group A, B, or D line, because all these calls originate from a point within a LATA. MCI submits that if Bell Atlantic would allow interexchange carriers to purchase local business lines over which they could access operator verification and interruption services, the LECs could develop a single, weighted rate to cover both services because the LEC would be able to identify the service requested and bill for it. *Id.* at 10.

2. Discussion and Conclusion

23. We conclude that Bell Atlantic has adequately explained its use of a single rate for both verification and interruption services. It explains that billing records do not permit it to distinguish between the two types of requests in interstate service. The records that are available apparently permit Bell Atlantic to determine requests by the interexchange carrier but not by the end user. In addition, Bell Atlantic states that it has requested such capability from its equipment manufacturer and, in the interim, has instituted an automated process to register in-coming requests for verification. That process appears to be sufficient.

D. *Cost Categories*

1. Investigation Issue; Pleadings

24. Issue 2(b) asked Bell Atlantic to provide data that segregate costs within each category and to describe the methodologies it used to allocate these costs to verification and interruption. The *Designation Order* requested a description sufficient to demonstrate that all of these costs are regulated interstate costs and that none of the costs is reflected in charges for other access elements.

25. Bell Atlantic states that Workpaper 2 separates costs into direct and indirect categories, and into verification and interruption categories. Bell Atlantic asserts that it used the operator work time study and the operator time costs to separate the categories, as discussed in its response to item 2(a). It observes that these operator services have not been provided by Bell Atlantic and that they became Bell Atlantic's responsibility only after operator take-back. Therefore, these costs were not previously recovered through interstate access charges. Bell Atlantic notes that these operator services are regulated interstate offerings and that their associated costs are interstate costs. Direct Case, App. at 11.

2. Discussion and Conclusion

26. We designated this issue in order to determine whether Bell Atlantic was reflecting costs associated with these operator services in its charges for other access services. Bell Atlantic has not satisfactorily addressed our concern that the use of loading factors to attribute indirect costs to these services is not consistent with the basic methodology for computing revenue requirements that is embodied in the access charge rules. Although Bell Atlantic's method was sufficient to compute initial charges for additional elements that reflect incremental costs that were not included in the base case for the 1987 access charges, Bell Atlantic should have distributed interstate investment and expense among all Part 69 access elements and other categories and all of the special elements established pursuant to Part 69 waivers, including these operator services elements, when it developed its base case for the 1988 access charges. Such a procedure is necessary to ensure that the same costs will not be reflected in more than one element or category. Our examination of the 1988 base case indicates that Bell Atlantic did not follow that procedure. It will accordingly be necessary to obtain a recast 1988 base case from Bell Atlantic that clearly shows the distribution of interstate investment and expense to these elements in order to determine whether any prospective rate adjustments should be required.

27. We therefore direct Bell Atlantic to resubmit these revised cost figures not later than August 26, 1988. After reviewing these data, it will be possible to determine whether any revision of rates for line status verification or call interruption services would be appropriate. Accordingly, we continue the investigation of this issue for purposes of reviewing the cost data Bell Atlantic is required to submit pursuant to this paragraph, and determining whether any rate adjustments are necessary.

III. CONCLUSION AND ORDERING CLAUSES

28. On the basis of the foregoing discussion, we conclude the investigation of all issues except Issue 2(b). As stated above, we conclude that Bell Atlantic's calculation of direct and indirect costs was sufficient for purposes of computing initial charges for these services, that it used a reasonable method to estimate demand given the constraints of its current system, and that Bell Atlantic has adequately explained its use of one rate for both of these services. We direct Bell Atlantic to resubmit revenue requirement calculations for line status verification and call interruption services in order to enable us to resolve Issue 2(b).

29. Accordingly, IT IS ORDERED that Bell Atlantic Telephone Companies must submit not later than August 26, 1988 calculations for line status verification and call interruption which include access costs.

30. IT IS FURTHER ORDERED that interested parties may file comments not later than September 9, 1988 and reply comments not later than September 23, 1988 in accordance with Part 1 of the Commission's Rules, 47 C.F.R. Part 1.

31. IT IS FURTHER ORDERED that the investigation of Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 172, CC Docket No. 87-255, is continued with regard to Issue 2(b) until this issue has been resolved, and terminated as to all other issues.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Verification is performed if a customer requests an operator to check the dialed party's line to verify a busy signal. If the call inquiry involves an interstate interLATA call, the interexchange carrier's operator must contact the exchange carrier's operator to request verification. The exchange carrier operator then checks the status of the line and reports the results to the interexchange carrier operator, who in turn reports the results to the inquiring customer. Bell Atlantic Tariff F.C.C. No. 1, Original Page 890.1.

[2] Interruption occurs if a customer asks an operator to interrupt a line in use. The customer may ask the operator to interrupt a conversation to request that the parties terminate their conversation so the inquiring customer may complete his or her call. For an interstate interLATA call, the interexchange operator must contact the exchange operator who then interrupts the call and requests the conversants to terminate their conversation. *Id.*

[3] Bell Atlantic Petition for Waiver, 2 FCC Rcd 1374 (1987).

[4] Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 172, filed Apr. 15, 1987. Bell Atlantic filed the transmittal on behalf of Bell of Pennsylvania and Diamond State Telephone Companies (Diamond State). Transmittal No. 172, Description and Justification (Transmittal D&J) at 2.

[5] Bell Atlantic Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 172, 2 FCC Rcd 4245 (1987) (*Designation Order*).

[6] For purposes of clarity, Issue 2(a) of the *Designation Order* is discussed out of sequence in this Order.

[7] Bell Atlantic Direct Case, Appendix (App.) at 1, filed Aug. 14, 1987 (Direct Case).

[8] MCI states that in Shared Network Facilities Agreements, the Bell Operating Companies contracted for operator services based on the capacity of the operator systems, and that their operator position expenses were based on units of capacity, which were calculated on the basis of busy hour usage. MCI assumes that

verification and interruption services are not significant contributors to the peak time usage upon which the AT&T-Bell Atlantic contract was based.

[9] Bell Atlantic's loading factor for operator related cost is 0.19, calculated using the equation C = (A - B)/B. A equals fully assigned cost (23.48) and B equals directly assigned cost (19.72). The loading factor for investment related cost is 0.0895, calculated using the equation C = (A + B)/A - 1. A equals annual cost factor (0.3834) and B equals fully assigned factor (0.0343).

[10] It explains that if there were 300,000 total operator calls, then the conversion factor would be 100.

[11] It observes that reliable data were not available for the last three months of 1987 since operator take-back had begun and AT&T no longer provided operator services for Bell of Pennsylvania.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166

In the Matter of

Investigation of Special Access Tariffs of Local Exchange Carriers — Phase I

ORDER

Adopted: July 7, 1988; Released: July 22, 1988

By the Chief, Common Carrier Bureau:

1. On May 26, 1988, the Bureau released a Memorandum Opinion and Order that ruled on various petitions for reconsideration in the above-captioned proceeding and established a calendar for the submission of claims in this refund matter.[1] The dates established for the filing of claims by television access user parties varied according to the requests made by those parties. Hughes Television Network (Hughes) was among those parties, and was granted a filing date of June 27, 1988, pursuant to its request.

2. On the day that its claim was due, June 27, 1988, Hughes filed a petition for extension of time to submit its refund request. Hughes states that gathering and analyzing the necessary materials have taken longer than it anticipated, and that its consultants have requested additional data from Hughes.

3. Under Section 1.46 of the Commission's Rules, a party filing for extension of time in other than a Rule Making proceeding shall either submit its request seven days before the date for filing, or, if it files less than seven days before the due date, shall serve the motion on all parties and orally notify those parties and the Commission staff responsible for acting on the motion that the motion has been or is being filed. 47 C.F.R. § 1.46(c). The rule also states that it is the policy of the Commission that extensions of time shall not be routinely granted. 47 C.F.R. § 1.46(a).

4. Hughes has neither met the procedural requirements of the Commission's Rules nor shown good cause why its petition should be granted. The Hughes petition was received in the office of the Acting Secretary of the Commission on the day on which the claim was to be filed. Although Hughes states that it did contact counsel for the American Telephone and Telegraph Company and for each relevant local exchange carrier, no Commission staff member responsible for acting on the motion was contacted regarding this request. Moreover, the filing date was set according to Hughes' own request, and Hughes has offered no persuasive reason for changing that date.

5. Accordingly, IT IS ORDERED that the petition for extension of time to submit refund requests filed by Hughes Television Network IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, DA 88-645, released May 26, 1988 (*Refund Reconsideration Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-98

In re Applications of

BETHANY BIBLE COLLEGE & BETHANY THEOLOGICAL SEMINARY, INC. File No. BPED-861229MH

For a Construction Permit for a New Non-Commercial Educational FM Station in Dothan, Alabama

Appearances

William H. Crispin, on behalf of Bethany Bible College & Bethany Theological Seminary, Inc.; and *Norman Goldstein*, on behalf of Chief, Mass Media Bureau.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: July 11, 1988; Released: July 22, 1988

PRELIMINARY STATEMENT

1. Three applications were designated for hearing in this proceeding to select a permittee to operate a new non-commerical educational FM station in Dothan, Alabama. Only the application of Bethany Bible College & Bethany Theological Seminary, Inc. (Bethany) remains. Bethany's application could not be granted because of an unresolved air hazard issue designated against it. *Hearing Designation Order*, DA 88-256, released March 23, 1988. On July 7, 1988, Bethany filed a Petition for Leave to Amend and Amendment containing a determination of the Federal Aviation Administration (FAA) that its proposed tower will not constitute a hazard to air navigation.[1] Bethany filed on the same date, a motion for summary decision on the air hazard issue in this case.

FINDINGS OF FACT

2. Bethany has received an FAA determination of no hazard to its proposed tower site. There remains no genuine issues as to any material fact in this proceeding. The designated air hazard issue is resolved in Bethany's favor.

CONCLUSIONS

3. The air hazard issue is resolved in Bethany's favor. There are no other basic qualifying issues pending against Bethany. Bethany's application is granted.

Accordingly, IT IS ORDERED, That the Petition For Leave To Amend And Amendment, and the Motion For Summary Decision ARE GRANTED and the application of Bethany Bible College & Bethany Theological Seminary, Inc. for a construction permit for a new non-commercial educational FM station in Dothan, Alabama IS GRANTED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] Bethany's amendment also reflects that the correct overall height of the existing structure is 143 meters, not 107 meters.

[2] In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Cookeville and Spencer, Tennessee;
and Burkesville, Kentucky)

MEMORANDUM OPINION AND ORDER

Adopted: June 29, 1988; Released: July 22, 1988

By the Deputy Chief, Policy and Rules Branch:

1. The Commission has before it the Petition for Reconsideration, filed by WHUB, Inc. (WHUB), licensee of Station WHUB-FM, Channel 252A in Cookeville, Tennessee, of the Commission's action by letter of October 7, 1987, denying acceptance of WHUB's Petition for Rule Making.

2. WHUB submitted a petition for rule making requesting the substitution of Channel 253C2 for Channel 252A at Cookeville, and modification of its station's license to specify operation on the higher class channel. In order to accomplish the substitution, WHUB suggested the substitution of Channel 274A for vacant but applied for Channel 253A at Burkesville, Kentucky and the deletion of also vacant but applied for Channel 254A from Spencer, Tennessee. The Burkesville and Spencer channels were allotted in the *First Report and Order* in MM Docket No. 84-231, 50 FR 3514, January 25, 1985. Subsequently, WHUB requested the dismissal of its petition for reconsideration.

3. Accordingly, the Petition for Reconsideration filed by WHUB, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-135

In the Matter of

Revision to amend Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies as it relates to the treatment of certain individual items of furniture and equipment costing500 or less.

REPORT AND ORDER

Adopted: June 28, 1988; Released: July 22, 1988

By the Commission:

I. INTRODUCTION

1. In a Notice of Proposed Rule Making (NPRM) released May 14, 1987,[1] the Commission proposed an amendment of its accounting rules that would permit telecommunications common carriers to expense certain individual items of equipment costing500 or less. The NPRM applied to individual items of equipment that are currently subject to a 200 expense limitation. This included items that, absent the expense limitation, would be recorded in accounts provided for central office equipment (limited to company-used tools and equipment), furniture and office equipment, other communications equipment, and vehicles and other work equipment.[2] In the NPRM, we also proposed amortization of the embedded balances of this equipment and requested estimates of the revenue requirement impacts for three-year, four-year, and five-year amortization periods. We also noted that if the revenue requirement impact of the proposed changes were undesirable, we would consider either limiting the increase in expense limits to furniture items or amending continuing property record requirements. For reasons stated hereinafter, we have decided to raise the expense limit to500 for the items that are the subject of this proceeding, but no special amortization period will be established. Further, continuing property record requirements will remain in effect for embedded items capitalized prior to the adoption of the new expense limit and all items which are required to be capitalized subsequent to the change in expense limits we are adopting here.

II. BACKGROUND

2. On October 20, 1986, The American Telephone and Telegraph Company (AT&T) filed a petition for a partial waiver of Sections 31.2-20(d), 31.221, and 31.262 of the Commission's rules to permit it to expense the cost of individual items of equipment costing500 or less and to amortize the previously capitalized, undepreciated investment in such items over a three-year period commencing January 1, 1986. Parties who commented on the Public Notice of the waiver request stated that the waiver should not be granted unless it was also extended to include all local exchange carriers. In addition to the AT&T waiver request, this Commission also had before it a joint petition for Rule Making filed by Pacific Bell, Southwestern Bell Telephone Company, New York Telephone Company and New England Telephone Company, and Cincinnati Bell, Inc., that requested an amendment of the accounting rules to exclude applicability of detailed continuing property record requirements to furniture type items from Account 261, Furniture and Office Equipment, in Part 31. Because a decision to raise the expense limit pursuant to the AT&T waiver would have affected the continuing property records that were the subject of the joint petition and thereby grant the joint petitioners a large measure of the relief they sought, we decided to deny the AT&T petition and deal with the issues raised in both the AT&T petition and the joint petition in the same Rule Making proceeding.

3. The NPRM was released on May 14, 1987, with comments and reply comments due June 12, 1987 and June 29, 1987, respectively. We received 20 comments and 8 reply comments. A complete listing of filing parties (and the abbreviations used) is included in Appendix A.

III. THE EXPENSE LIMIT

a. Positions of the Parties.

4. Comments and reply comments filed by the carriers support the proposal to raise the expense limit. Generally, these parties believe the change would reduce the administrative burden and costs on the carriers and benefit ratepayers by lowering the rate base over time. NYNEX states that raising the expense limits would improve current capital recovery and the problem of depreciation shortfalls resulting from low depreciation rates and the use of capitalization where expensing would be appropriate. [3] Ameritech believes that raising the expense limits for items that are currently subject to the200 limitation would result in administrative efficiencies and actually reduce overall revenue requirements by avoiding the carrying charges associated with the capitalized investment.[4] Ameritech, AT&T, and others[5] assert that raising the expense limits would help reduce the disparity between the accounting practices of the regulated carriers and the practices of comparable unregulated firms. Ameritech and AT&T call specific attention to a study performed by the public accounting firm of Coopers & Lybrand, which accompanied AT&T's original waiver request, and indicated that fewer than 10 percent of the companies responding to the survey had expense limits below500.[6] USTA, claiming that the expense limit has changed several times in the last six years,[7] urges this Commission to consider the adoption of expedited procedures to change the expense limits as circumstances change in the future.[8]

5. Many of the carriers[9] believe that this Commission should allow them flexibility in implementing the timing of any changes so that the carriers can implement them simultaneously with any changes imposed by state jurisdictions. SNET believes that if a local exchange carrier were to have different expensing limitations in interstate and intrastate jurisdictions, modifications to computerized accounting systems would be extremely difficult, if not im-

possible to make. AT&T, in its reply comments, states that such concerns can be addressed by providing carriers with the flexibility to implement the expensing limit during 1987 or at any time thereafter. AT&T believes providing this sort of flexibility would be preferable to delaying relief for all carriers because of the particular needs of a few.[10]

6. NYDPS opposes adoption of the proposal because it believes that this change, in addition to changes to the Uniform System of Accounts and the adoption of Generally Accepted Accounting Principles, will increase intrastate revenue requirements. However, NYDPS states that if the expense limit is raised, we should limit any change to the items currently subject to the200 ceiling.[11] DCPSC opposes the proposal to the extent it would permit expensing of deferrable plug-ins regardless of cost.[12] MPSC is not opposed to raising the expense limits but urges that the change be made effective January 1, 1988.[13] CPUC is not opposed to changing the limits to 500 for furniture and office equipment.[14] California also is not opposed to changing the expense limits but believes that equipment items recorded in central office equipment accounts should be excluded. It favors such exclusion because equipment items are customarily purchased as packages even though they might consist of a number of small units that might otherwise qualify for expense treatment.[15] FPSC believes there may be some benefits in raising the expense limits but requests that the rule changes be written to explicitly exclude central office equipment and outside plant except for tools, test sets, furniture and office equipment, other communication equipment, vehicles, and other work equipment costs recorded in those accounts.[16]

7. In its reply comments, Western Union opposes any increase in expense limits for the local exchange carriers. It argues that by permitting carriers to expense the cost of capital items, this Commission would be requiring current ratepayers to pay for future utilization. Whether there will be any future benefit, according to Western Union, is entirely speculative. Western Union asserts that there has been no showing in this proceeding that items that are the subject of this proceeding are underdepreciated, or that local exchange carriers are disadvantaged because unregulated firms employ more liberal expensing practices. Western Union also notes that alleged administrative burdens have not been quantified.[17]

b. Discussion

8. Past actions of this Commission in raising expense limits were motivated primarily by changes in economic circumstances.[18] In those actions, we recognized that the results of inflation had raised prices to an extent that items which had been expensed in previous years had qualified under the then existing expense limitation as capital expenditures. These items were included in the rate base, upon which we allow a rate of return, and depreciated over time. We concluded then that it would be in the public interest to raise the expense limits and avoid burdening ratepayers of future periods with the obligation to provide a return on the investment in those items. The same action also relieved the carriers of the burdens of tracking large volumes of items which were of relatively little consequence in relation to total plant in service. In raising the expense limits from25 to50 in 1974, and from50 to200 in 1981, we took into consideration, the impact these changes would have on revenue requirements and the likelihood that future changes might be needed. We also took into consideration the expense limitation used in our rules in relation to those imposed by other regulatory bodies on the companies they regulate.

9. As we were in the past, we are concerned in this proceeding with the impact our proposed increase in the expense limitation would have on revenue requirements. With this in mind, we solicited revenue requirement impact information in the NPRM. The information submitted by 13 carrier respondents indicates that the revenue requirement attributable to expensing new purchase between the current and proposed limits would be approximately120 million if the rule were to be applied in 1987 and approximately102 million if applied in 1988.[19] These amounts are not of the magnitude to prevent us from raising the expense limit to500.

10. It has been six years since the expense limits have been changed and, while a straightforward application of an inflation adjustment would not yield an increase of the size proposed in the NPRM,[20] there is a sufficient body of evidence to suggest that our200 expense limitation is far too low. As pointed out earlier, AT&T submitted a survey prepared by the public accounting firm of Coopers & Lybrand which showed that fewer than ten percent of the companies surveyed now use an expense limitation below 500. Moreover, there is evidence to suggest that our increase in 1982 was very conservative even for that time. Cost Accounting Standards imposed on defense contractors have had an expense limit of1000 since 1980 (4 C.F.R. §404), and at about the same time we raised the expense limitations for telecommunications common carriers, the Interstate Commerce Commission raised expense limits for common and contract motor carriers of passengers and property to500.[21]

11. NYDPS, opposes raising the expense limitations for any equipment category.[22] Part of the NYDPS objection may be related to an uncertainty over what equipment would be subject to the expense limitation. NYDPS states that the NPRM could be interpreted as applying to all central office equipment. This is not the case. Our proposal was limited to those items to which the200 limit now applies. As these items were classified as central office equipment recorded under Part 31 in Account 221, Central Office Equipment, this basically included tools and testing equipment.[23] It is unclear the extent to which NYDPS' uncertainty may have inspired its opposition. We assume our clarification will allay much of NYDPS' concern particularly since the other parties having regulatory jurisdiction over telecommunications services do not oppose raising the expense limits to500 for all or some of the equipment subject to the current200 limitation.[24]

12. While not opposing our proposal concerning other types of equipment, California would exclude central office equipment on the grounds that the central office equipment account contains complementing assets that might otherwise qualify for expense treatment but are generally purchased from one manufacturer as a package. California believes that it is inappropriate to segment the components of such packages for separate accounting treatment. In our view, there seems to be little justification for singling out central office related assets for different treatment when the same circumstances can occur with items recorded in other accounts. For example, in many furniture acquisitions the components of a package purchase can be purchased and used independently from the other components they complement.[25] If a requirement to bundle package purchases for the purposes of

making capitalization *versus* expensing decisions were to be incorporated in our rules for central office assets based solely on the manner of purchase, it should be extended to the accounts where similar package purchases occur. But we do not believe such a rule would resolve California's concern, because it could be so easily avoided by changing purchasing patterns. Moreover, we would not want to create backhandedly a disincentive to take advantage of what, in many situations would be the economical means of acquiring low value items. We will not, therefore, single out central office related assets for special treatment nor will we establish a rule that could be easily circumvented.

13. We also believe the rules adequately deal with like items acquired in bulk purchases. Part 32, before and after the change we proposed, provides for the use of the material and supplies accounts until items are placed in service, if the aggregate investment in the individual items is relatively large at the time of acquisition. This would apply not only to the items formerly classified in central office accounts under Part 31 and now included in Account 2116, Other Work Equipment, but the other accounts that would be affected as well.

14. Western Union believes that our proposal to raise expense limits to500 will force current ratepayers to pay for future utilization of assets, the benefits of which are highly speculative. Carried to its logical conclusion, Western Union's argument would support universal capitalization of items having a useful life extending beyond one year. The return element and the cost of tracking the items included in this proceeding notwithstanding, capitalization of all items having a useful life extending beyond one year and depreciating them over time is the only way that the original cost of the items can be matched against the rates paid by ratepayers over different periods. We do, however, allow a rate of return on capitalized items used in the provision of telecommunications services and there are administrative costs associated with tracking the items that are the subject of this proceeding. Taking the return element and the administrative burdens into consideration, this Commission recognized long ago that efficiencies can be achieved by expensing some low-value items in the period they are purchased, rather than capitalizing them, carrying them in the rate base with the attendant continuing property record requirements, and allowing a rate of return in the investment. Generally, when capitalization of large volumes of low value items can be avoided, it is in the public interest to expense them in the period they are purchased.[26]

15. Many of the carriers[27] support flexibility in timing the implementation of a change in the expense limit. However, in comments responding to AT&T's original waiver request, many of the commenters believed that a waiver of the rules should not be granted to AT&T unless similar relief was extended to all local exchange carriers as well. Most notable among them were the comments of MTN, NWB, and PNB, which specifically stated that uniformity would be desirable because of intercarrier pooling arrangements. It was largely based on these and other comments that our Rule Making proceeding was instituted. We have no intention of creating an "open-ended" environment which would result in situations where some carriers could be adopting the new limits in 1989, others in 1990, and still others possibly not at all. Such freedom would detract from the uniformity and comparability among carriers that the uniform system of accounts is intended to achieve. While we take this position with respect to any "open-ended" situation, we will permit some flexibility to adopt the new expense limits in 1988 or 1989.

16. In view of the foregoing, we conclude that the expense limits for items currently subject to a200 expense limit should be raised to500, and we will therefore amend Part 32 accordingly. Pursuant to Section 220(g) of the Communications Act of 1934, as amended, this change cannot take effect until at least six months after the release date. Consistent with that Section of the Act, we will make this rule change effective for all carriers no later than January 1, 1989. However, carriers will also be permitted to adopt the new limit effective as early as January 1, 1988.

IV. AMORTIZATION

a. Positions of the Parties

17. The parties commenting in this proceeding are almost evenly split between recommending a three-year or five-year amortization of embedded balances of equipment with an original cost falling between200 and500.[28] Several parties also urged the Commission to adopt a flexible approach to allow consistent treatment of an appropriate amortization period between interstate and intrastate jurisdictions.[29] Bell Atlantic, NYNEX, and Southwestern Bell believe that individual local exchange carriers and the states should be given the opportunity to fashion appropriate amortization periods. Such flexibility, according to Bell Atlantic, will assure that the expense limits will be increased to a level which is appropriate for individual circumstances in different jurisdictions. MPSC agrees with such an approach. AT&T, in its reply comments, states that these concerns can be addressed by providing carriers with the flexibility to implement the new expensing limits any time during 1987 or thereafter and to use amortization periods of three years or longer.[30]

18. NYDPS opposes any special amortization of embedded balances as does California, who does not oppose raising the expense limits for most items on a prospective basis.[31] NYDPS believes there is no significant record-keeping burden associated with maintaining these items in current accounts and therefore there is no need to implement the amortization.[32] California notes that carriers are afforded an opportunity for capital recovery of their investment through regularly scheduled reviews for re-prescribing depreciation rates.[33] MPSC notes that reserve deficiency (recovery) issues can be addressed through periodic represcription of depreciation rates.[34] FPSC believes that a ten-year amortization period is appropriate for low cost equipment that has been capitalized.[35] Western Union sees no merit in the amortization of embedded costs over periods less than the projected remaining service life of these assets.[36] Western Union believes that since costs associated with establishing continuing property records have already been incurred, any cost savings associated with changing these requirements for property the subject of a special amortization should be insignificant.[37]

b. Discussion

19. Among the commenting parties there was widespread support for flexibility in the amortization schedule. There are widespread amortization differences among the various jurisdictions that are apparent from the comments. For example, NYDPS and California oppose any amortiza-

tion of embedded balances, and FPSC would impose a ten-year amortization. Such widespread differences mitigate our inclination to adopt a single amortization period for all carriers. Another matter which leads us to conclude that the imposition of a single amortization period would be an inappropriate measure is the fact that carriers have other means available for recovering their embedded costs. As California and MPSC observe, carriers are afforded an opportunity for capital recovery through regularly scheduled reviews for represcription of depreciation rates. Finally, as Western Union and NYDPS observe, the costs associated with tracking the items that have already been capitalized are already in place.

20. These considerations outweigh the desirability of imposing a single amortization period for all previously capitalized items falling between the old limit and the new limit we are establishing on a prospective basis here. Therefore, we will not establish a specific amortization period here and we will handle any changes in depreciation related to those items through established mechanisms for capital recovery.

V. CONTINUING PROPERTY RECORDS

a. Positions of the Parties

21. In the NPRM we indicated that, if raising the expense limits were found to be inappropriate, we would consider relieving the carriers from maintaining continuing property records (CPR) for furniture type items. Western Union favors the elimination of CPR requirements as an alternative to raising the expense limits.[38]

22. The Pacific Companies believe that raising the expense limit does not go far enough in alleviating many of the record keeping burdens associated with tracking items of small value. The Pacific Companies recommend the elimination of the detailed CPR requirements for all furniture type items currently recorded in Account 261, and believe that the use of a mass asset accounting approach would satisfy the objectives of the petition filed by Pacific Bell, Southwestern Bell, New York Telephone Company and New England Telephone Company and Cincinnati Bell.[39] Ameritech supports the Pacific Companies proposal.[40] CPUC and NYDPS oppose eliminating the requirement to maintain CPR for furniture type items. NYDPS believes that the CPR requirements are necessary to ensure that capitalized items recorded on the books can be verified as long as they remain in service and are properly accounted for when retired.[41] The Pacific Companies contend that although NYDPS argues in favor of CPR requirements, NYDPS does not demonstrate the need for the information or rebut the joint petitioners' conclusion that the cost of maintaining the records outweighs the benefits.[42]

23. FPSC believes that if its suggestion for raising the expense limit is adopted, this Commission's concerns over the burdens of the CPR as it relates to large volumes of small dollar items would be eliminated. MPSC believes that if this Commission raises the expense limit, there is no need to address the petition to exclude requirements for detailed CPR for furniture items.[43]

b. Discussion

24. The CPR applies to capitalizable items. Our decision to raise the expense limits for the items that are the subject of this proceeding, relieves carriers of CPR requirements for items costing500 or less, on a prospective basis. Thus, the remaining question relates to the CPR requirements as they would apply to embedded items falling between the200 and500 limits for which we are not prescribing any special amortization.

25. Since we have decided against any special amortization for embedded items falling between the200 and500 limits, we are inclined to agree with the position taken by NYDPS and CPUC, that CPR requirements should remain in effect for these embedded items. We believe CPR requirements will be necessary to support the accuracy of depreciation rates and any changes thereto prompted by capital recovery considerations that may occur in the future. We see no necessity to extend additional relief by eliminating continuing property records for furniture items, as the joint petitioners suggest. Accordingly, the CPR requirements will remain in effect for all embedded items that were required to be capitalized before January 1, 1988 and for all items which are required to be capitalized subsequent to the change in expense limits we adopt here.

VI. OTHER MATTERS

26. We certify that the Regulatory Flexibility Act[44] is not applicable to the rule changes we are proposing in this proceeding. In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of this *Notice* in the Federal Register. As part of our analysis of the proposal described in this Order, however, this Commission has considered the impact of the proposal on small telephone companies, i.e., those serving 50,000 or fewer access lines.[45] The action proposed herein would have a beneficial economic impact on 1370 such telephone companies because the changes discussed in this Order are expected to benefit all carriers, including those indirectly affected, by relieving them of certain record keeping and reporting requirements.

27. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to modify the information collection burden which the Commision imposes on the public. This modification in information collection burden is subject to approval by the Office of Management and Budget as prescribed by the Act.

VII. ORDERING CLAUSE

28. IT IS ORDERED, That under the authority contained in Sections 4(i), 4(j) and 220 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j) and 220, Part 32, Uniform System of Accounts for Telecommunications Companies, of the Commission's Rules IS AMENDED as shown in Appendix B below, effective **January 1, 1989.** Implementation in 1988 will be permitted.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX A

Comments were filed by:
American Telephone and Telegraph Company (AT&T)
Ameritech Operating Companies (Ameritech)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
Colorado Public Utilities Commission (CPUC)
Contel Corporation (Contel)
District of Columbia Public Service Commission (DCPSC)
Florida Public Service Commission (FPSC)
GTE Service Corporation (GTE)
Kiesling Asociates
Michigan Public Service Commission Staff (MPSC)
Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone
Company, and Pacific Northwest Bell Telephone Company (MTN, NWB, and PNB)
New York State Department of Public Service (NYDPS)
NYNEX Telephone Companies (NYNEX)
Pacific Telecom, Inc. (P.T.I.)
Pacific Telesis Group (the Pacific Companies)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (Southwestern Bell)
United States Telephone Asociation (USTA)
United Telephone System Companies (UTS)

Reply comments were filed by:
AT&T
Ameritech
Bell Atlantic
Cincinnati Bell Telephone Company (CBT)
GTE
the Pacific Companies
People of the State of California and the Public Utilities Commission of the State of California (California)
Western Union Telegraph Company (Western Union)

APPENDIX B

Part 32, Uniform System of Accounts for Telecommunications Companies, is amended as follows:

1. The authority citation for Part 32 reads as follows:

Authority: Secs. 4(i), 4(j) and 220 as amended; 47 U.S.C. 154(i), 154(j) and 220 unless otherwise noted.

2. Section 32.2000 is amended by revising paragraph (a)(4) to read as follows:

§32.2000 Instructions for telecommunications plant accounts.

(a) * * *

(4) The cost of individual items of equipment, classifiable to Accounts 2112, Motor Vehicles; 2113, Aircraft; 2114, Special Purpose Vehicles; 2115, Garage Work Equipment; 2116, Other Work Equipment; 2122, Furniture; 2123, Office Equipment; and 2124, General Purpose Computers, costing500 or less or having a life less than one year shall be charged to the applicable Plant Specific Operations Expense accounts. If the aggregate investment in the items is relatively large at the time of acquisition, such amounts shall be maintained in an applicable material and supplies account until items are used.

* * * * *

FOOTNOTES

[1] 2 FCC Rcd. 2788 (1987)

[2] While the petition that originally initiated this proceeding related to Part 31 of our rules, we announced an intention to amend Part 32 of our rules, which replaced Part 31, effective January 1, 1988. Revision of the Uniform System of Accounts for Class A and Class B Telephone Companies, 51 F.R. 24745, July 8, 1986 and F.R. 43493, December 2, 1986 (new Part 32). The new Part 32 has the same200 expense limit as Part 31. *See* §32.2000(a)(4).

[3] NYNEX comments at 2.

[4] Ameritech comments at 2.

[5] *Id.* at 3; AT&T comments at 3; the Pacific Companies comments at 4; GTE comments at 3; and USTA comments at 6.

[6] The survey included 19 Fortune 500 companies and 7 large utilities.

[7] *But see* para. 8, *infra*.

[8] USTA comments at 6.

[9] Ameritech comments at 4; Bell Atlantic comments at 3; GTE comments at 4; NYNEX comments at 4; SNET comments at 7-8; Southwestern Bell comments at 3; United comments at 6; USTA comments at 5-6. AT&T replies at 4, Cincinnati Bell replies at 2. This support also extended to the amortization periods. *See* para. 14.

[10] AT&T replies at 4. AT&T also suggests providing flexibility to amortize embedded balances over periods of three years or longer. AT&T cites several situations in which this Commission

has provided similar flexibility in the past. Among them are the implementation dates and amortization periods for expensing station connection costs. 85 FCC 2d 818, 828-829 (1981).

[11] NYDPS comments at 3.

[12] DCPSC comments at 1. DCPSC defines "plug-ins" as manufactured electronic components which may be connected to a central office switch to provide particular line services. The units are deferrable if their installation can be postponed until after the switch has entered service. Plug-ins replace the need for permanent "hard wiring" of switches to obtain certain services. The issue of deferrable plug-ins was settled in another proceeding. In that order, the Commission denied a Bell Atlantic petition to expense deferrable plug-ins costing200 or less. 2 FCC Rcd, 5896 (1098) (*Bell Atlantic Plug-in Order*). We decline, therefore, to include deferrable plug-ins among the items of equipment considered in this proceeding.

[13] MPSC comments at 2. MPSC also urges that if we adopt the proposed changes, that we do not use capital recovery as our rationale. MPSC believes there is no cost recovery problem here because any alleged deficiency is given appropriate consideration in periodic represcription of remaining life depreciation rates.

[14] CPUC comments at 1. CPUC refers specifically to furniture and office equipment in its comments. CPUC's position on raising the expense limits for other items is unclear.

[15] California replies at 5.

[16] FPSC comments at 6.

[17] Western Union replies at 2-4.

[18] *See , e. g.*, CC Docket 20110, 49 FCC 2d 1153 (1974) and CC Docket 81-273, 46 F.R. 52376, October 27, 1981.

[19] These totals include the Regional Bell Holding Companies, GTE, Contel, SNET, UTS, P.T.I., and AT&T.

[20] During the period 1980-1985 the producer price index for commercial furniture rose by 30.6 percent and for machinery and equipment it rose 24.6 percent. Statistical Abstract of the United States, 107th edition p. 459.

[21] 49 CFR Parts 1206 and 1207, Increasing the Minimum Rule on Capital Expenditures 46 F.R. 45959, September 16, 1981.

[22] NYDPS also opposes the adoption of a new amortization policy for the items in question.

[23] Under Part 31, company used minor tools and equipment of that type were subject to the200 expense limit (*See* Section 31.221 - Note G). Under Part 32, when similar items exceeding the200 limit are capitalized, they are recorded in Account 2116, Other Work Equipment.

[24] *See* para. 6 *supra*. Some of the parties, however, oppose the amortization portion of the proposal.

[25] When components cannot be used independently from other complementing components in the same package, they should be regarded as single units.

[26] This does not extend to deferrable plug-in equipment. *See Bell Atlantic Plug-in Order* note 12 *supra*.

[27] *See* para. 5 *supra*.

[28] Some carriers recommend a three year period. AT&T comments at 5; Contel comments at 5; P.T.I. comments at 3; SNET comments at 6; MTN, NWB and PNB comments at 1; and United comments at 2. Other carriers recommend a five year period. Bell South comments at 4; GTE comments at 4; and the Pacific Companies comments at 7.

[29] Bell Atlantic comments at 3; GTE comments at 4; NYNEX comments at 4; USTA comments at 5; SNET comments at 4; Southwestern Bell comments at 8.

[30] In support of its suggestion, AT&T cites instances in which we have provided for similar flexibility in the past. The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended, for: *The Chesapeake and Potomac Telephone Company*, 99 F.C.C. 2d 1094, 1097 (1984); *Uniform System of Accounts*, 85 F.C.C. 2d 818, 828-829 (1981). *See also Illinois Bell Teleph. Co.*, 95 F.C.C. 2d 1249 (1983).

[31] NYDPS comments at 3 and California replies at 2.

[32] NYDPS comments at 3.

[33] California replies at 3.

[34] MPSC comments at 2.

[35] FPSC comments at 2.

[36] Western Union replies at 6.

[37] *Ibid.*

[38] Western Union replies at 2.

[39] The Pacific Companies comments at 5-6.

[40] Ameritech replies at 3.

[41] NYDPS comments at 4.

[42] The Pacific Companies replies at 2.

[43] MPSC comments at 3.

[44] 5 U.S.C. § 601, *et seq.* (1987).

[45] Because of the nature of local exchange and access service, this Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See MTS and WATS Market Structure*, 93 FCC 2d 241, 338-39 (1983). Thus, this Commission is not required by the terms of that Act to apply the formal procedures set forth therein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-286

In re

Low Power Television and
Television Translator Service

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1988; Released: July 20, 1988

By the Commission:

INTRODUCTION

1. Before the Commission are two petitions seeking reconsideration of certain aspects of the Commission's decision in *Low Power Television and Television Translator Report and Order* (*LPTV Report and Order*), 62 RR 2d 423 (1987). The first is a petition for partial reconsideration by Bahia Honda, Inc. (Bahia),[1] requesting the Commission to reconsider that portion of the *LPTV Report and Order*, which holds that applications to change frequencies filed by displaced low power television and television translator (LPTV)[2] licensees can be made subject to a lottery proceeding where competing applications have been filed for the new frequency requested. The other is a petition for reconsideration filed by WPIX, Inc. and the Association of Independent Television Stations, Inc. (WPIX) requesting the Commission to modify the procedures adopted in the *LPTV Report and Order* to afford further relief to those TV translator stations displaced from UHF channels 70-83 by land mobile radio services.

BACKGROUND

2. On June 26, 1986, the Commission instituted a Rule Making proceeding designed to reduce the tremendous number of LPTV applications to be filed during nationwide filing windows and to provide a measure of relief to LPTV stations displaced by the authorization of conflicting primary services, either full service television or land mobile radio service. [3] The result of that proceeding was the Commission's adoption of the *LPTV Report and Order*.

3. In the *Report and Order*, the Commission decided to retain the nationwide filing window approach but imposed a limit or "cap" of five applications per window that may be filed by any applicant or entity having an interest of one percent or greater in application(s) filed in that particular window. The Commission concluded that a nationwide approach with restrictive cap of five new applications per window would best assure that all applicants have the ability to file the applications they most desire to file, while at the same time ensuring against overfiling and its attendant delays.

4. Of particular importance here, the Commission also decided to provide limited relief to LPTV permittees and licensees forced to cease operation due to actual interference that would be caused to full-time television services or land mobile radio services, and other protected services, authorized by the Commission. Accordingly, it adopted a procedure whereby displaced LPTV permittees and licensees would be permitted to apply for operation on a new channel, without the need for competitive consideration, provided that their applications were not mutually exclusive with any other pending LPTV application or outstanding authorization.[4] Moreover, the Commission provided that such applications could be tendered at any time regardless of the existence of any filing window or application freeze. In addition, under this procedure, such applications, if acceptable for filing, would not be treated as "major change" applications under Section 73.3572(a)(1) of the Commission's rules and, therefore, would not be subject to mutually exclusive applications but only to petitions to deny.[5] However, if an application tendered by a displaced LPTV licensee or permittee is found to be mutually exclusive with any other new or major change application, it would be processed with these other applications and subjected to the random selection process (lottery) under Section 309(i) of the Communications Act of 1934, as amended.

5. Although other proposals for further relief to displaced licensees were advanced in the proceeding, the Commission declined to adopt them either because the remedies suggested were outside the scope of the Rule Making proceeding or because they would unduly strain the Commission's resources, produce undue hardship on existing applicants or not otherwise serve the public interest. Accordingly, it concluded that additional relief was not warranted.

COMMENTS

6. In its petition, Bahia questions, at the outset, the Commission's reliance on Section 309(i) of the Communications Act[6] as authority to include applications filed by displaced licensees in a lottery when those applications are mutually exclusive with pending LPTV applications. It maintains that it was Congress' intent that the lottery provision apply only to an initial applicant, not to existing licensees in the low power services. In Bahia's opinion, displaced licensees are not new applicants but are licensees seeking only to modify their license. It concludes that Section 309(i) of the Act is inapplicable and therefore the Commission is precluded from using the random selection or lottery process for the purpose of deciding among mutually exclusive applicants when one is a displaced licensee.

7. Because Bahia is of the opinion that the Commission cannot properly apply Section 309(i) to displaced licensees in the LPTV services, it suggests two proposals as alternatives. First, Bahia proposes that a displaced station receive a "decisive preference" for any available, unused channel, *i. e.*, any channel on which no station is currently authorized, regardless of the existence of pending applications. In such a case, the displaced station's license would be modified to authorize operation on the unused channel and any pending applications that were mutually exclusive with the displaced licensee's modified application would be dismissed. Bahia maintains that such a procedure is

workable and, moreover, would reduce the number of outstanding applications, thus expediting service to the public.

8. Bahia further states that equitable considerations favor the preservation of the service provided by the displaced licensee when weighed against the minimal interests a new applicant has in entering the lottery. In this regard, it argues that LPTV licensees are experienced providers of service with a substantial investment in that service, whereas other applicants may not have any experience in operating a broadcast facility and, unlike displaced licensees, may have incurred only the minimal costs of filing their applications. In addition, use of a lottery in such situations, Bahia asserts, creates an uncertainty about retaining licensee status which discourages investment and creates instability. It concludes that, given the public interest benefit of preserving an existing service and the equities favoring a displaced licensee, its proposal is fair.

9. The other alternative Bahia suggests is that the Commission conduct comparative hearings in which the displaced licensee would receive a preference akin to a "renewal" or "improvement" expectancy. Such a preference is warranted, Bahia maintains, because successful lottery applicants often fail to construct stations or are delayed by financial difficulties when they do. It points out that a displaced licensee who is forced to apply for a new channel will lose its license if it loses the lottery, thus depriving the public of a proven service. It concludes, therefore, that use of comparative hearing with a preference for an existing service is particularly compelling under such circumstances.

10. In its petition for reconsideration, WPIX seeks further relief for those television translator licensees which have been displaced from UHF channels 70-83 by land mobile radio services and have no uncontested vacant channel available for which to apply. Citing the difficulty of finding a vacant channel with no pending applications in a populous area, WPIX proposes that in the absence of a channel unsought by others, land mobile-displaced translators should be permitted to modify their operations to a lower unused channel without facing competing applications if another vacant channel is available for which those competing applications may be considered. Those pending competing applications would be entered into the lottery process for the second vacant channel with the applications already pending for that channel. In situations in which there are several displaced translator licensees competing for few available channels, WPIX suggests a priority system be used which would favor the licensee with the longest continuous service to the community. Where there is only one unused channel with applications pending, WPIX favors a lottery selection process which would not subject applicants to further competing applications through additional filing windows or cut off lists.

11. In support of its petition, WPIX states that restricting the proposed relief to the relatively few translators displaced from channels 70-83 by land mobile radio would only create limited disruption of pending applicants' engineering proposals. Such effects would be offset by the efficiency with which service could be implemented on at least one channel. Further, WPIX alleges, the proposal would cause little, if any, prejudice to pending applicants because they would be able to compete for the second available channel. As precedent for such action, WPIX cites the *Channel 16 Public Safety Allocation* proceeding[7] in which the Commission reallocated UHF channel 16 in Los Angeles to land mobile use pursuant to its authority under Section 316(a) of the Communications Act to modify a license in the public interest. WPIX emphasizes that the reallocation was made even though two applications to provide television service on that channel had been filed and an Initial Decision had been rendered by an Administrative Law Judge in a comparative hearing between the applicants for that television facility. In that instance, WPIX notes, the Commission indicated that a substitute channel would be available for which the pending applicants could apply.

12. Three parties filed comments expressing varying levels of support for the proposals. The Association of Maximum Service Telecasters (MST) states that the relief granted translators by the Commission is of little effect in major markets where all channels are either filled or have applications pending. It therefore supports the WPIX petition in its entirety and the petition filed by Bahia to the extent that it provides a processing priority for displaced translator applicants over existing applicants. The National Association of Broadcasters (NAB) shares MST's view, and expresses concern that under the Commission's new rules some translators will be forced off the air, leading to a diminution of service to the public. It, therefore, also supports extension of the WPIX proposal to all displaced translators, regardless of whether they are displaced by land mobile radio service or a full service television station. NAB also supports the use of an automatic priority system which would eliminate the need for a selection process in instances where there are several displaced translators and few channels available to which they can modify.

13. The Community Broadcasters Association (CBA) states that adoption of Bahia's proposal would increase the security of investment in LPTV stations and promote stability necessary for a viable LPTV industry. It supports WPIX's proposal to the extent that WPIX suggests that licensees displaced from channels 70-83 should be free from competing applications if another vacant channel exists for which the competitors could apply. However, CBA maintains that processing of low power television and television translator applications should be treated equally and, therefore, the proposal of WPIX is improper to the extent that it suggests that priority be given to translators.

DISCUSSION

14. After careful consideration of the record in this proceeding, we are not convinced that persuasive reasons have been presented for granting additional relief to displaced permittees and licensees in the low power services beyond that originally provided in our *LPTV Report and Order*. At the outset, it should be noted that such licensees have been provided explicit, full, and clear public notice that operation in these secondary services entails the risk of displacement by the primary services of full time television stations and land mobile radio service operations.[8] Indeed, as early as 1970, when the Commission reallocated UHF channels 70 through 83 from broadcast to land mobile use, television translators in this band have been on notice that their operations were subject to displacement.[9] As we stated in the *Notice* in this proceeding, these stations have always been considered secondary to full service television stations in spectrum priority. In

short, we have emphasized repeatedly that low power television and television translator stations are a secondary service and, as such, subject to displacement without any attendant right to operate on other channels.

15. Moreover, we have previously considered and rejected processing priorities for television translator applicants, as well as attempts to prioritize applications based on considerations such as programming service.[10] Nevertheless, mindful of the effects our policies might have on stations displaced by full service television and land mobile radio stations, we have struck what we believe to be an appropriate balance given the secondary nature of these services and our view that displaced licensees should be permitted some flexibility to relocate to frequencies not presently authorized or applied for by others. We are not convinced that granting further relief as requested by petitioners would serve the public interest. On the contrary, granting of such relief would unduly complicate and disturb existing procedures governing these services, would be manifestly unfair to existing applicants, and would not necessarily produce any substantial countervailing benefits in bringing new LPTV services to public fruition. For these reasons alone, we believe further relief is not warranted. In the following paragraphs, however, we explain more fully our reasons for denying each of the petitions.

16. Bahia argues that Congress did not intend Section 309(i), which authorizes the Commission to use a lottery system "if there is more than one application for any initial license," to apply to displaced licensees. It maintains that, because they are already a licensee, they are not applying for an "initial" license. As an initial matter, however, Bahia's argument ignores the fact that we have consistently considered major change applications as the equivalent, for processing purposes, of an "initial" application, since, by definition, they involve requests for substantially different, *i. e.* new, facilities. An applicant proposing new facilities in a major modification application is, unlike a renewal applicant, making an initial application for those facilities. Under the Commission's rules, applications for a channel change, filed by an existing licensee, are considered major changes and are processed the same as new applications.[11] Indeed, from the very outset, we clearly stated that proposed "major changes" would be treated as initial applications for lottery purposes.[12] Our decision to treat a change in channel or frequency requested by a displaced LPTV station as a "major change", except when the application is not mutually exclusive with other applications, in no way deviates or otherwise departs from existing Commission policy or precedent.

17. As this relates to Section 309(i), we are aware of nothing in the statute or the legislative history underlying Section 309(i) that suggests that Congress meant to alter existing Commission policy or precedent on this issue or otherwise preclude the Commission from treating "major change" applications as initial applications. The statute affords us considerable flexibility with regard to its use. The Conference Report, which accompanied the bill, listed several criteria which the Conference Committee felt should be considered prior to determining whether a lottery should be conducted. Among these criteria are the existence of a large number of mutually exclusive applications for each license and the existence of application backlogs.[13] Moreover, there is nothing to suggest that Congress was not aware of the Commission's existing policy of treating "major change" applications the same as new applications. Accordingly, we believe our decision to subject to a lottery a mutually exclusive application involving a "major change," including those applications of displaced LPTV licensees, comports with our authority under Section 309(i).[14]

18. Although the alternative forms of relief requested by Bahia -- the decisive preference and comparative hearing process with a "renewal" or "improvement" expectancy for a displaced licensee -- were premised on the view that the Commission cannot subject displaced LPTV licensees to a Section 309(i) lottery proceeding, we shall address the proposals and their merits as though Bahia's interpretation of Section 309(i) were correct. As indicated earlier, under the decisive preference approach, Bahia suggests that we permit displaced licensees to specify an unused channel and be authorized to operate on it. Such an approach, in our view, would be patently unfair to existing applicants since it would require us to dismiss all pending, mutually exclusive applications for that channel without *any* prior notice whatsoever.[15] Moreover, such a procedure would not necessarily be limited to immediate dismissal of applications for the specific channel involved but could lead to dismissal of pending applications on adjacent channels as well thereby prejudicing the interests of applicants for these other channels also without prior notice.[16] Moreover, this problem would require a significant expenditure of Commission resources to identify and return the conflicting applications and to resolve related appeals by parties adversely affected. As indicated above, absent compelling reasons, of which none have been presented, we decline to adopt any proposal that exhibits such undesirable traits.

19. But Bahia further maintains that balancing the interests of an existing station against the interests of an applicant dictates that the existing service be favored because of the experience they possess and their substantial investment in the service. In support thereof, it cites *Channel 16* for the proposition that an applicant's interests are minimal in comparison to those of an existing licensee's. It should be emphasized, however, that the *Channel 16* decision also stands for the proposition that even existing licensees can be displaced by reallocations. In that case, we specifically stated that we had no legal obligation to locate a substitute channel for which full power applicants could apply.[17] Aside from the unique factors involved in that case, if in fact the Commission had no obligation to provide relief to a displaced primary service in the form of a presumptive preference for an alternative channel, it follows that a licensee which is operating in a secondary service and has been on notice all along that it could be displaced at any time is not entitled to such consideration. If the displaced licensee should have to cease operation, it is a consequence of the secondary status of the LPTV service and our policies defining this service. There is no doubt that existing licensees may be adversely affected as a result of our lottery procedure,[18] but, the Act requires us to promote the public interest, not protect the interests of individual licensees.[19]

20. As a final alternative, Bahia requests that we engage in comparative hearings in which the displaced licensee would receive a preference akin to a "renewal" or "improvement" expectancy based on its past broadcast record.[20] It argues that a comparative hearing is preferable to a lottery because lottery winners often fail to construct a facility, resulting in a disservice to the public. In Bahia's opinion, use of a comparative hearing process would avoid

the automatic loss of license and deprivation of service to the public which they assert occurs when a displaced licensee loses the lottery. This alternative, however, is also unacceptable. As we have previously recognized, there would be substantial shortcomings involved in applying the comparative hearing process to LPTV services. Nothing has transpired to alter our perception of the myriad difficulties that would ensue from such a process and the delay that would result in the introduction and authorization of LPTV services to the public. The very reason for utilizing lottery procedures was to avoid this process. Implementation of this procedure now that we are midway into the existing process would create considerable confusion and would introduce burdens the Commission decided could be avoided by the lottery process.[21]

21. We also decline to adopt the WPIX proposal for essentially the same reasons discussed above. Under their proposal, those translator licensees displaced from channels 70-83 would be given a construction permit on an unused channel when another unused channel exists to which all pending applications could be moved. As an initial matter, it bears reiteration that these licensees have had explicit notice; since 1970, that displacement and relocation to a lower channel could be expected. At that time, there were significantly more available unused channels for which a displaced licensee could apply. Indeed, in 1982 it became even more evident that relocation would be imminent when we ceased requiring television receivers to be capable of receiving channels 70-83. Thus, the petition filed by WPIX is untimely in presenting these issues and presents concerns which could have been avoided had the licensee acted with alacrity. Nonetheless we will consider the merits of the WPIX proposal.

22. Granting the relief requested by WPIX would be the equivalent of a preference for television translators over all pending applicants for a particular channel which, as discussed above, the Commission has declined to do. As a practical matter, it would be difficult to determine which pending applicants would have to change channel in order to free it for use by the displaced station.[22] Moreover, since applicants have tailored their proposals to a particular site and channel, it would be unjust to require a station, without prior notice, to reengineer or resubmit their proposal[23] and subject them to further competition when, in fact, a cut-off date may have passed. Additionally, the effect of reallocating these applications may also adversely affect an existing daisy chain by expanding it to include additional applicants. In fact, previously unlinked applications may become mutually exclusive with other unconnected applications, thus creating entirely new daisy chains. For these same reasons we previously declined a petition for Rule Making, filed by CBA, generally proposing this approach for relief to displaced LPTV stations.[24]

23. Although we do have the authority, as WPIX observes, to modify a station's license under Section 316(i) of the Act and did exercise that authority in the *Channel 16* decision, we believe that such authority should be exercised sparingly especially in instances where the interests of existing applicants are adversely affected without any prior notice. Moreover, as we stated above, *Channel 16* involved unique facts and circumstances unlike the present situation before us. Accordingly, in view of the administrative difficulties created under the WPIX proposal, and the unfairness created with respect to pending applications, we decline to exercise that authority and, therefore, reject the WPIX proposal as unworkable for the LPTV and TV translator services.[25]

CONCLUSION

24. The Commission is, and always has been, fully aware that certain hardships are concomitant with the secondary status of the low power services. In order to avoid precisely the type of demands now being made upon the Commission, it explicitly provided notice to licensees operating in the secondary services that their operations would be subject to displacement in order to accommodate, without interference, authorized primary services. By doing so, the Commission has attempted to afford such licensees some opportunity to examine other potential areas and frequencies on which to relocate in the event of being displaced. That such opportunities may not exist in all circumstances does not mean that loss of overall service to the public will occur. To the extent that a displaced translator or low power television service is being replaced by a full power broadcast station, the Commission has determined, in designating it as a primary service, that the benefits of full power service outweigh the loss of a secondary service. Where the secondary service is displaced by land mobile radio service, the same analysis applies. If an LPTV licensee must cease operation, it would in most instances be due to a lack of available channels, indicating that a large quantity of other services already exists or are being proposed. For these reasons, we are convinced that grant of additional relief as requested in the petitions and the comments filed in response thereto would not redound to the overall public interest.

25. Accordingly, IT IS ORDERED, That the Petition for Partial Reconsideration filed on April 13, 1987, by Bahia Honda, Los Cerezos Television Company, Seven Hills Television Company, Spanish International Communications Corporation and Las Tres Campanas Television IS DENIED.

26. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by WPIX and the Association of Independent Television Stations on April 13, 1987, IS DENIED.

27. Authority for the action taken herein is contained in Section 1.4(i) and 303 of the Communications Act of 1934, as amended, and in Section 1.115 of our Rules.

28. For further information on this proceeding, contact Douglas Minster, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Bahia Honda is joined on the petition by Los Cerezos Television Company, the Seven Hills Television Company, Spanish International Communications Corporation, and Los Tres Campanas Television.

[2] All references to "LPTV" or "low power" include television translators except when otherwise stated.

[3] *See Notice of Proposed Rule Making, Low Power Television and Television Translator Service*, 104 FCC 2d 1368 (1986). [hereinafter *Notice*]. In an effort to accommodate the anticipated growth of land mobile services, in 1970 the Commission determined that the public interest would be served best by reallocating channels 70-83 to land mobile use and permitting translator services to relocate to channels 14-69. *See Spectrum Space for Land Mobile Services*, 19 RR 2d 1663, *recon. denied* 20 RR 2d 1512 (1970). The Commission expected the impact on translators to be minimal, reasoning that land mobile service equipment development and growth would be slow and limited to urban areas for several years, thus providing translator licensees with more than adequate opportunity to relocate. *Id.* at 1667. In 1982, based on our reallocation decision, we eliminated rules requiring that television sets be capable of receiving channels 70-83. *See Improvements to UHF Television Reception*, 90 FCC 2d 1121 (1982). In an effort to reduce the burden on translator licensees entailed in requiring immediate relocation as a result of this decision, we instead left it to their discretion to decide when to relocate to a lower channel. *Id.* at 1128-29.

[4] Applications filed by permitees and licensees which were previously displaced and which were operating pursuant to special temporary authority (STA) on a different channel for which no mutually exclusive applications are filed would also be granted if they were found to be acceptable for filing.

[5] In order to qualify for displacement relief, however, the low power television and television translator station has to demonstrate that the proposed change is necessary to avoid any predicted interference to land mobile radio operations or to an authorized full service television station as defined by Sections 74.705 and 74.709 of the rules. Additionally, the application by such a station permittee or licensee may not propose a significant change in the station's service area.

[6] 47 U.S.C. 309(i) authorizes the Commission to use a lottery proceeding "if there is more than one application for any initial license."

[7] 59 RR 2d 910 (1986), *recon. denied*, FCC 86-579 (released February 25, 1987). [hereinafter *Channel 16*]

[8] For example, such prior notice was given, *inter alia*, in the *Report and Order in BC Docket No. 78 - 253*, 51 RR 2d 476, 494 (1982); the *Second Report and Order in BC Docket No. 81 - 768*, 93 FCC 2d 952, 983 (1983), and *Memorandum Opinion and Order*, 48 Fed. Reg. 21478, 21480 (1983).

[9] *See Spectrum Space for Land Mobile Services*, 19 RR 2d 1663, *recon. denied*, 20 RR 2d 1512 (1970). Thus, during the lengthy period they have been on notice, the particular translator licensees operating in this band have been afforded ample opportunity to relocate to the lower channels.

[10] *See Report and Order in MM Docket No. 83 - 1350*, 102 FCC 2d 295, 301-308 (1984); *Reconsideration of Report and Order in BC Docket No. 78 - 253*, 53 RR 2d 1267, 1277 (1983); and *Report* and Order in BC Docket No. 78-253, 51 RR 2d 476, 484-485 (1982).

[11] 47 CFR 73.3572(a)(1).

[12] See Second Notice of Proposed Rulemaking, 91 FCC 2d 911, 912 n.3 (1982); Second Report and Order in BC Docket 81-768, 93 FCC 2d at 981.

[13] H.R. Rep. No. 765, 97th Cong., 2d Sess., at 37 (1982). Indeed, the backlog to which the legislative history referred included hundreds of applications filed by existing licensees seeking a channel change or other major changes.

[14] Telecommunications Research and Action Center v. FCC, 836 F.2d 1349, 1361 (D.C. Cir. 1988). Although "major change" requests are usually subject to competing applications, we believe it is in the public interest to exempt certain applications from the "major change" provisions of the Commission's rules in order to grant partial relief to displaced licensees in these secondary services. This in no way undermines our treatment of "major change" applications under Section 309(i). This is because in order to qualify for this limited exemption, the LPTV application must specify a channel which is not mutually exclusive with any other pending application or outstanding authorization for LPTV service, therefore, a Section 309(i) issue does not arise.

[15] Displaced LPTV licensees, when they submitted their applications, were advised that their proposed operations were subject to displacement by authorization of a primary service on that channel. Although existing applicants are on similar notice, we do not believe that the ground rules governing their applications should be materially changed to their substantial detriment absent compelling reasons.

[16] Generally, pursuant to the interference rules in the LPTV service, interference to or from other authorized or proposed television stations can be predicted on the first, and additionally for UHF LPTV stations, the second, third, fourth, and fifth adjacent channels above or below the channel on which the displaced licensee would want to operate, and on the seventh channel above and the fourteenth and fifteenth channel below the channel in question. *See* generally §74.705 and §74.707 of the Rules.

[17] Channel 16 Reconsideration, FCC 86-579, at para. 9 (Released February 25, 1987).

[18] We do not deny that a lottery procedure by its very nature entails risks for applicants participating in it. These risks are, to some extent, lessened by some of the options available based on conditions existing in the marketplace. Aside from the chance involved in winning the lottery, an applicant can reach a settlement with competing applicants and obtain a construction permit. If the displaced licensee loses the lottery, it may continue to operate on the channel until the winner is prepared to begin broadcast operations. During this time, however, the licensee is free to negotiate an assignment of the construction permit awarded to another applicant in the lottery or locate a construction permit or license on another channel to purchase. Further, the licensee may file an application for another channel and operate there pursuant to special temporary authority (STA). Indeed, if no competing applications exist, the licensee may be granted a construction permit under the displacement rules.

[19] FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 475 (1940).

[20] This is a proposal that was advanced earlier in this proceeding but rejected as falling outside the scope of the rule making.

[21] Report and Order in BC Docket No. 78-253, 51 RR 2d 476, 487. Moreover, we have also previously decided that past broadcast record should not be a comparative consideration in the LPTV service "because so many applicants are new entrants to the telecommunications industry . . . it could disadvantage them to accord merit or demerit that only could be garnered by applicants with previous broadcast experience." Id. at 572. To grant some type of preference for past broadcast service would run directly counter to this objective.

[22] Due to the effects on the daisy chains involved, this would entail a process even more complex than that involved in locating and dismissing applicants as discussed at note 16 and accompanying text.

[23] Such a requirement would also result in increased burdens for the Commission. Since the processing of such applications involves computer programs which are designed to operate in a particular manner, modification of these programs would be re-

quired to permit all information from the new applications to be entered into the data base and all older applications removed. It is unclear how that would serve the public's interest.

[24] See Memorandum Opinion and Order, 59 RR 2d 1216 (1986).

[25] The effects of displacement of these licensees are ameliorated, to a degree, by other options available to them. See supra note 18. Because we have declined in the exercise of our discretion to adopt WPIX's proposal, we do not find any need to address their argument regarding the priority to be given for length of service when two or more licensees are requesting the unused channel nor CBA's concern regarding that aspect of WPIX's proposal.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
July 5, 1988

Released: July 8, 1988

8910-CRM

Lauren A. Colby, Esquire
10 E. Fourth Street
P.O. Box 113
Frederick, Maryland 21701

In re: WKNR(AM) assignment application

BAL-870924EA

Battle Creek, Michigan

Dear Mr. Colby:

This is in reference to the above-captioned application for assignment of license of station WKNR(AM), Battle Creek, Michigan, from WKNR Broadcasting Corporation to Triad/Comm. Co. (Triad). Triad is also the licensee of station WALM(AM), Albion, Michigan, and a grant of the instant application will result in a violation of Section 73.3555 of the Commission's Rules due to the overlap of the 1 mV/m contours of WKNR and WALM.[1] Thus, on September 18, 1987, you requested a permanent waiver of Section 73.3555(a) to allow Triad's acquisition of WKNR. Additionally, on November 9, 1987, z. you filed a supplement requesting, in the alternative, a waiver conditioned upon Triad's divestiture of either WKNR or WALM within six months of the Commission's action in MM Docket 87-7, 2 FCC Rcd 1138 (1987), if the duopoly rule is not modified in a manner that would allow Triad to own both WKNR and WALM.

Your initial waiver request, submitted in anticipation of proposed changes to the duopoly rule in MM Docket 87-7, was denied pursuant to delegated authority by Larry D. Eads, Chief, Audio Services Division. The denial letter stated that to grant Triad a permanent waiver based upon such proposed changes to the duopoly rule would be to prejudge improperly the rule making. *See, Cactoctin Broadcasting Corp.*, FCC 86-355, released July 31, 1986. Futhermore, the staff concluded that a waiver conditioned upon the outcome of the rule making proceeding was inappropriate, distinguishing your case from *Capital Cities/ABC*, 2 FCC Rcd 2539 (1987). In *Capital Cities*, divestiture required pursuant to a waiver granted before the institution of MM Docket 87-7 was deferred until six months after the Commission's action in the rule making proceeding. In the instant case, however, Triad seeks to create a prohibited overlap in anticipation of the outcome of the rule making proceeding.

Subsequently, on December 24, 1987, pursuant to Section 1.106(a)(1) of the Commission's rules, you filed a petition for reconsideration of the staff's decision, and counsel for assignor WKNR Broadcasting Corporation filed a petition for reconsideration four days later. Both petitions contend that in denying Triad's waiver request, the staff failed to consider Triad's commitment to divest itself of WALM within 180 days of consummation if the assignment of WKNR is granted. This divestiture commitment was filed on December 18, 1987, the day the staff's denial letter was mailed.

The engineering study that you submitted in support of your initial waiver request and later-filed supplement indicated that the overlap occurs during daytime hours over an area of 42 square miles that includes a population of 3,015 persons.[2] In addition, the overlap represents 10.66% of the area and 2.75% of the population within the WKNR 1 mV/m contour, and 4.4% of the area and 3.9% of the population within the WALM 1 mV/m contour. You stated that the overlap area is well served by a plethora of other broadcast signals, as nine FM and five AM stations serve the entire area, and an additional five FM and four AM facilities serve portions of the overlap area. Therefore, you contended that competition and program diversity would not suffer if a waiver was granted. Finally, you asserted that by allowing the assignment of AM station WKNR to Triad, another AM broadcaster, both WKNR and WALM would be financially strengthened.

The basic principles embodied in the Commission's multiple ownership rule are to promote diversity of ownership in order to maximize the diversification of viewpoints, as well as to prevent any undue concentration of economic power contrary to the public interest. *See , Multiple Ownership Rules*, 97 FCC 2d 997 (1984), *recon. granted in part and denied in part*, 58 RR 2d 604 (1985), *further recon. granted in part and denied in part*, 1 FCC Rcd 802 (1986). The Commission is not, however, without flexibility to respond to situations where application of fixed multiple ownership standards would be contrary to other public interest concerns. Thus, for example, in some cases we have waived the rule in order to achieve appropriate and desirable improvements of service. *See , Silver King Broadcasting of Vineland, Inc.*, 2 FCC Rcd 324 (1986). However, before such a waiver can be granted an applicant must sustain the burden of showing that the benefits to be achieved by its proposal are in the public interest and that a waiver would not compromise the fundamental policies served by the rule.

Upon review of the record, we have determined that a grant of your request for a 180-day temporary waiver would be consistent with the public interest and Commission precedent. *See, Family Television Corp.*, 59 RR 2d 1344 (1986). In *Family Television*, the Commission granted an assignment of license along with a 12-month waiver of the duopoly rule to allow the applicant additional time to complete the orderly divestiture of one of the stations with overlapping 1 mV/m contours. The Commission based its decision on the applicant's commitment to achieve compliance with the duopoly rule promptly. The Commission granted the temporary waiver despite a 553 square mile overlap that covered 7.6% and 5.6% of the 1 mV/m contours in question, explaining that the size of the overlap is a more important consideration in cases involving requests for permanent waivers.

Here, the 42 square mile area of overlap between WKNR and WALM is relatively small in comparison with that involved in *Family Television*, as is the overlap of the 1 mV/m area considered on a percentage basis (10.66% and 4.4%, respectively). Additionally, the overlap here is served by a number of other media interests, ensuring the likelihood that no undue concentration of the media or adverse effect on public opinion will result if Section 73.3555 is temporarily waived. Moreover, your client has represented that it will dispose of WALM within 180 days of consummation if the instant assignment of license is granted. Finally, while *Family Television* involved a waiver of 12 months, Triad seeks only a six-month waiver, further assurance that under these circumstances the temporary waiver of Section 73.3555 will not result in an undue concentration of the media nor create any detriment to the policies underlying the rule.

Accordingly, upon a finding that the applicant is qualified and the public interest will be served, the application to assign the license of WKNR(AM), Battle Creek, Michigan from WKNR Broadcasting Corporation to Triad/Comm. Co. has been granted this date. Additionally, your request for a six-month waiver of the duopoly provisions of Section 73.3555 of the Commission's Rules is hereby granted and will expire 180 days from the date of consummation of the WKNR transaction. We emphasize, however, that we will not prejudge the outcome of the rule making, and as such do not intend to extend this *one time* six-month waiver in the future pending a decision in that proceeding.

BY DIRECTION OF THE COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-351

In the Matter of

The Plenipotentiary Conference of
the International Telecommunication
Union, Nice, France (1989)

NOTICE OF INQUIRY

Adopted: June 30, 1988 **Released: July 8, 1988**

By the Commission:

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I. INTRODUCTION

1. We initiate this proceeding in order to inform the general public, particularly the U.S. telecommunications community of users and companies interested in the provision of international telecommunications facilities, services and related equipment, of the upcoming International Telecommunication Union's 13th Plenipotentiary Conference in 1989 and the important decisions that will be made therein.[1] While this conference does not deal directly with regulation of international and domestic telecommunications *per se*, its impact on the American public is nonetheless important because of the PLENIPOT's authority to replace or modify any portion of the International Telecommunication Convention -- the treaty document that controls all ITU activities and sets the general principles applied in establishing international rules for the provision of telecommunications, the use of the electromagnetic spectrum and the use of the Geostationary-Satellite Orbit (GSO).

2. The Commission's overriding objective, in compliance with its statutory mandate,[2] is to maximize the public interest benefits derived from the United States' communications facilities and services. Three of the Commission's specific goals are: (1) promoting, wherever possible, a competitive marketplace for the development and use of communications facilities and services; (2) promoting efficiency in the allocation, licensing and use of the electromagnetic spectrum and geostationary orbit; and (3) protecting and promoting the interests of the American public in international communications. In furtherance of these goals, the Commission is issuing this Notice of Inquiry to inform interested companies and individuals of the upcoming PLENIPOT, present some possible issues that may arise at the PLENIPOT, and provide an opportunity for public comment. This is basically an information providing and gathering proceeding, as opposed to a preparatory effort for a specific technical conference, and the comments provided in response to this Notice of Inquiry will assist the Commission in its preparations for the PLENIPOT and can be of value to the intragovernmental preparatory process which has already begun to take shape within the primary interested agencies (the Commission, the Department of State, and the National Telecommunications and Information Administration). The information developed within this proceeding will be made available to the preparatory process of the U.S. ITU PLENIPOT Delegation. [3]

II. BACKGROUND

A. *Brief History of the ITU*

3. The International Telecommunication Union (ITU) is the world's oldest international, intergovernmental organization. Formed in 1865 as the International Telegraph Union, it dealt solely with telegraphic matters until the early 1900's when emerging radio technology prompted consideration of these matters on an international scale. In 1927, the then existing Telegraph Convention and Radiotelegraph Convention were amalgamated in an "International Telecommunication Convention" to which the International Telegraph, Telephone and Radio Regulations were annexed. The present day ITU structure was instituted at the Atlantic City Conference of 1947, at which time the ITU became recognized as the United Nations specialized agency responsible for telecommunications. The United States is one of 164 Member countries currently in the ITU and has ratified the current ITU Convention (Nairobi, 1982) along with the current Administrative Regulations.[4]

4. As set forth in the current ITU Convention, the general purposes of the Union are to:

> maintain and extend international cooperation for the improvement and rational use of telecommunications of all kinds;
>
> promote the development of technical facilities and their most efficient operation with a view to improving the efficiency of telecommunication services, increasing their usefulness and making them, so far as possible, generally available to the public; and
>
> harmonize the actions of nations in the attainment of those common goals.[5]

B. ***Structure of the Current ITU***

5. Pursuant to the current ITU Convention, the ITU is comprised of the following organs:

the Plenipotentiary Conference;

Administrative Conferences;

the Administrative Council; and

the permanent organs of the Union:

(i) the General Secretariat;

(ii) the International Frequency Registration Board (IFRB);

(iii) the International Radio Consultative Comimittee (CCIR); and

(iv) the International Telegraph and Telephone Consultative Committee (CCITT).[6]

6. In accordance with the current ITU Convention, the Members of the Union normally meet in a PLENIPOT at intervals of five to six years. The PLENIPOT is the supreme organ of the Union which determines general policy, conducts elections for the elected officials of the Union, reviews the Union's work since the last PLENIPOT and revises the Convention if it considers it necessary. It also establishes the basis for the Union's annual budgets, establishes a program of future conferences and meetings, and sets general limits on expenditures until the next PLENIPOT.[7]

7. Members also hold two kinds of Administrative Conferences: World Administrative Conferences and Regional Administrative Conferences. The agenda of a World Administrative Conference may include partial revision of the Administrative Regulations, complete revision of one or more of these Regulations, and any other communications issues of a world-wide character within the competence of that conference. The agenda of Regional Aministrative Conference may consider only telecommunications issues of a regional nature, including instructions to the International Frequency Registration Board (IFRB) regarding its activities in respect of the Region concerned, provided that such instructions do not conflict with the interests of other Regions.[8] The decisions of a Regional Conference must conform in all circumstances with the provisions of the Administrative Regulations.[9]

8. The Administrative Council is an elected group of 41 Member countries (including the U.S.) which meets annually to act on behalf of the PLENIPOT in the interval between PLENIPOTs and within the limits of power delegated to it. The Council, among other things: sets the budget for the coming year; sets the agendas for scheduled conferences (including dates and locations); determines a yearly policy of ITU technical assistance; acts on administrative matters within the ITU; and oversees the operation of the Union by the staff of the permanent organs of the Union.[10]

9. The General Secretariat is directed by a Secretary-General, assisted by one Deputy Secretary-General, both elected by the Members at a PLENIPOT. Dealing with the day-to-day running of the ITU, the General Secretariat is responsible for, *inter alia* : coordination and publication of telecommunication service data related to operation of services; external and legal representation of the Union; Membership protocol; provision of secretariat services to conferences and meetings; administration, finance, computer, conference and public information services; and planning and management of technical cooperation and related development programs for developing countries.[11]

10. The IFRB consists of five independent radio experts, each from different regions of the world, elected by the Members at a PLENIPOT and working full-time at the Union's headquarters.[12] They elect a Chairman and a Vice-Chairman for each year from among their own number. The Board's main task is to decide whether radio frequencies which countries assign to their radio stations (and which they have notified to the Board) are in accordance with the Convention and the Radio Regulations and will not cause harmful interference to other registered stations. If the Board's finding in a particular case is favorable, the frequency is recorded in the Master International Frequency Register kept by the IFRB and obtains formal international recognition and protection. An average of more than 1200 frequency assignment notices, covering new assignments or changes to existing assignments, are filed with the IFRB each week.

11. The CCIR and CCITT are separate bodies dealing respectively with technical radio problems and technical telegraph and telephone problems. All Member countries of the ITU are members of the two CCIs by right. Recognized Private Operating Agencies (RPOAs) may be members with the approval of their sponsoring Member country. International Organizations (IOs) and regional telecommunication organizations may be admitted to participate in an advisory capacity. Scientific or industrial organizations may be admitted to participate in an advisory capacity with the approval of their sponsoring Member country. Each CCI holds a Plenary Assembly every few years. The Plenary Assembly draws up a list of technical telecommunication subjects or "Questions", the study of which would lead to improvements in international radio communication or international telegraphy and telephony. These Questions are then referred to a number of Study Groups, composed of experts from different countries. The Study Groups draw up Recommendations which are submitted to the next Plenary Assembly. If the Assembly adopts the Recommendations, they are published. CCIR and CCITT Recommendations have an important influence with telecommunication scientists and technicians, operating administrations and companies, manufacturers and designers of equipment throughout the world.[13]

12. The current elected officials of the ITU, elected at the last PLENIPOT (Nairobi, 1982) and their countries are:

Secretary-General	Richard Butler (Australia)
Deputy Secretary-General	Jean Jipguep (Cameroon)
Members of the IFRB	1. W.H. Bellchambers (United Kingdom) 2. A. Berrada (Morroco) 3. G.C. Brooks (Canada) 4. V.V. Kozlov (USSR) 5. Y. Kurihara (Japan)

The elected officials of the CCIs, elected at their respective Plenary Assemblies, are:

Director of the CCIR	R. Kirby (United States)
Director of the CCITT	T. Irmer (Federal Republic of Germany).[14]

C. *UnitedStates Participation in the Current ITU*

13. The ITU and its permanent organs provide a central forum for the discussion of international telecommunication issues between Member countries. The IFRB provides a central registration and coordination facility for worldwide coordination and listing of frequency assignments and orbital locations, while the two CCIs work toward standards (CCIR for radio and CCITT for telegraph and telephone) that facilitate international interoperability of telecommunications equipment and networks. In participating in the work of the ITU, the U.S. Government and the private sector interested in international telecommunications work together to represent U.S. interests. The Department of State acts as the U.S. Administration[15] in coordinating and effectuating general administrative, political and foreign policy matters with the ITU and its staff, as it does with all international treaty organizations. The Commission establishes the general telecommunications policy for the United States, pursuant to its statutory mandate, and acts as the U.S. Administration *vis - a - vis* the ITU with respect to certain functions: (1) notification and coordination of frequency assignments; (2) licensing matters; and (3) communications technical expertise.[16] The three primary agencies which deal with ITU matters (the Commission, Department of State and NTIA) provide staff personnel who participate in the preparatory activities for and actual convening of ITU meetings and conferences.[17]

14. In addition to U.S. Delegation and general preparatory activities, the United States participates in the ITU through individuals working within the ITU. For example, a U.S. national (Mr. Richard Kirby) is the current elected Director of the CCIR. As of January 1, 1987, U.S. nationals occupied 17 of the 267 compensable staff positions at ITU Headquarters to which the principle of geographic distribution applies.[18] Also, U.S. nationals, usually from the private sector, provide leadership in non-compensable positions dealing with ITU activities, including: Chairman of the ITU World Plan Committee; Chairmen and Vice-Chairmen of various CCIR and CCITT Study Groups and Working Parties; Special Rapporteurs for study questions with the CCIR and CCITT; and membership on the Advisory Board of the Centre for Telecommunications Development (CTD).

D. *The Nairobi PLENIPOT (1982)*

15. The last ITU PLENIPOT was held in Nairobi, Kenya for six weeks, starting on September 27, 1982. The U.S. contingent at the Nairobi PLENIPOT totaled 67 participants and was headed by Ambassador Michael R. Gardner.[19] The U.S. preparatory process for Nairobi developed more than 70 separate position/information papers and formulated a unanimous statement of U.S. policy (Scope Paper), which became the basic element of guidance for the U.S. Delegation. In addition to these papers developed by the inter-agency and industry group that later became the core of the U.S. Delegation, the U.S. conducted more than 35 bi-lateral discussions with both developed and developing countries prior to the conference. Shortly before the start of the Nairobi PLENIPOT, the U.S. announced the establishment of the United States Telecommunications Training Institute (USTTI).[20] This announcement was timed to emphasize the U.S. Delegation's affirmative commitment to the broad-based programs of the ITU, especially in the area of technical cooperation.

16. Unfortunately, the Nairobi PLENIPOT initially spent a great deal of time with issues totally removed from telecommunications. The first three and one-half weeks were consumed with efforts to exclude Israel from the Conference and from future ITU meetings and conferences. This effort was vigorously opposed by the U.S. Following much procedural maneuvering and heated rhetoric, a harsh censure of Israel was adopted in place of exclusion.[21] After disposition of that effort, the remainder of the Conference was subject to efforts by many administrations to cast issues as disputes between developed and developing countries in the context of telecommunications capabilities and provision of services.[22]

17. Despite this extreme politicization of the process, the substantive work of the Nairobi PLENIPOT did progress. In addition to amendments to the 1973 ITU Convention (Malaga-Torremolinos, 1973), resulting in the current ITU Convention, most of the formal results from Nairobi are reflected in the Final Protocol, Additional Protocols, Optional Additional Protocol, Resolutions and Opinions of the Conference. Significant substantive results of the Nairobi PLENIPOT include:

Election of ITU officials;[23]

Amendment of Article 8 of the ITU Convention to expand membership on the Administrative Council from 36 to 41 Member countries and election of new Council members until next PLENIPOT (including the U.S.);[24]

Addition of the phrase "to promote and offer technical assistance to developing countries in the field of telecommunications" to the first listed purpose of the Union in Article 4 of the ITU Convention;[25]

Retention of the ITU's traditional system of financing Union activities via voluntary contributions rather than adoption of the U.N. scale of mandatory apportionments;[26]

Approval of budget ceilings for annual ITU operations;[27]

Revision of Article 6 of the ITU Convention to reduce the maximum interval between Plenipotentiary Conferences to six years;[28]

Establishment of a planned program of administrative conferences, both World-wide and regional, through September 1989;[29]

Amendment of Article 33 of the ITU Convention dealing with rational use of spectrum and the GSO to include the phrase "taking into account the special needs of the developing countries and the geographical situation of particular countries";[30]

Establishment of the Independent International Commission for World-Wide Telecommunications Development. This group became known as the Maitland Commission. It issued its report entitled "The Missing Link" in January 1985. That report became the impetus for the establishment of the International Centre For Telecommunications Development;[31]

Initiation of a study to change the basic instrument of the Union from the present Convention format to a Constitution/Convention format to align the ITU

basic instrument with the stability and continuity qualities of the basic instruments of all other specialized agencies of the United Nations;[32]

Initiation of a study of the Long-Term Future of the International Frequency Registration Board (IFRB);[33]

Initiation of continued study of the "Extended Use of the Computer by the IFRB" pursuant to a revised Incremental Plan for implementation over the period 1984-1992.[34]

In signing the ITU Convention and the associated results of the Nairobi PLENIPOT at the conclusion of the Conference, the United States issued three statements in the Final Protocol, including one reservation.[35] The United States did not subscribe to the Optional Additional Protocol dealing with compulsory settlement of disputes.

III. THE 1989 PLENIPOT

A. *General*

18. The Nairobi PLENIPOT decided that the next ITU Plenipotentiary Conference should be held during the first four months of 1989.[36] Pursuant to actions of the ITU Administrative Council and an invitation from the French Government, the 1989 PLENIPOT will be held in Nice, France, during the period 23 May 1989 through 29 June 1989.[37] The agenda of the 1989 PLENIPOT will be as set forth in Article 6, paragraph 2 of the ITU Convention:

(a) determine the general policies for fulfilling the purposes of the Union prescribed in Article 4 of this Convention;

(b) consider the report by the Administrative Council on the activities of all the organs of the Union since the previous Plenipotentiary Conference;

(c) establish the basis for the budget of the Union and determine a fiscal limit for the expenditure of the Union until the next Plenipotentiary Conference after considering all relevant aspects of the work of the Union in that period, including the programme of conferences and meetings and any medium-term plan submitted by the Administrative Council;

(d) provide any general directives dealing with the staffing of the Union and, if necessary, fix the basic salaries, the salary scales and the system of allowances and pensions for all the officials of the Union;

(e) examine the accounts of the Union and finally approve them, if appropriate;

(f) elect the Members of the Union which are to serve on the Administrative Council;

(g) elect the Secretary-General and the Deputy Secretary-General and fix the dates of their taking office;

(h) elect the members of the International Frequency Registration Board and fix the dates of their taking office;

(i) elect the Directors of the International Consultative Committees and fix the dates of their taking office;

(j) revise the Convention if it considers this necessary;

(k) conclude or revise, if necessary, agreements between the Union and other international organizations, examine any provisional agreements with such organizations concluded, on behalf of the Union, by the Administrative Council, and take such measures in connection therewith as it deems appropriate; and

(l) deal with such other telecommunication questions as may be necessary.

B. *Potential Significant Issues*

19. It would be impossible to list all potential issues that may arise at the Nice PLENIPOT and inappropriate to address some. However, it is obvious that the Nice PLENIPOT will have a profound impact on all ITU Member countries and their telecommunications infrastructures. Therefore, we have identified several potential issues that could have a significant impact on U.S. telecommunications policy and/or on U.S. companies and individuals involved with international telecommunications. While we generally call for public comment on the totality of the agenda for the Nice PLENIPOT, we particularly solicit views with regard to those issues we address below.

20. *Role of the ITU* : The purposes of the ITU and the methods of effectuating these purposes are set out in Article 4 of the ITU Constitution. As the specialized agency of the United Nations with regard to telecommunications matters, the ITU has resolved to:

continue to work for the harmonization, development and enhancement of telecommunications throughout the world;

ensure that all its work reflects the position of the ITU as the authority responsible within the United Nations family for establishing in a timely manner technical and operational standards for all forms of telecommunication and for effecting the rational use of the radio frequency spectrum and of the geostationary-satellite orbit;

encourage and promote technical cooperation in the field of telecommunications among Members to the maximum possible extent.[38]

21. Given the technological advances in the telecommunications world, the increasing use of computers in association with telecommunications, the increasing worldwide interest in trade of telecommunications services and equipment, establishment of regional standards setting organizations (such as the European Telecommunications Standards Institute), and the changing approaches to telecommunications by increasing numbers of ITU Member countries, it would be appropriate to carefully consider what should be the future role of the ITU in the world community. In particular:

a) Should the ITU role in the UN family of agencies change?

b) What should be the ITU's role in relation to organizations such as the Organization for Economic Cooperation and Development (OECD) and the European Commission (EC)?

c) What should be the ITU's role in relation to other standards organizations (*e. g.* : International Standards Organization; ETSI; U.S. T-1 Committees; etc.)?

d) What is the proper role for the ITU *vis - a - vis* the General Agreement on Trade and Tariffs (GATT) talks, especially regarding telecommunications trade in services and equipment?

e) Should the ITU maintain its traditional role, or expand or confine its interests? Which outcome would be in the best overall interests of the U.S.?

f) In what ways can the ITU assist in achieving advancement of U.S. telecommunications and information policy interests?

g) Does the study question approach, used by the CCIs to develop international telecommunication standards in the form of Recommendations, continue to be a useful method in today's fast-paced technological world, or would some different approach (*e. g.* : project programs in common areas of interest, under common management) be more practical and efficient?

22. *Election of ITU officials* : There will be nine senior positions in the ITU up for election at the Nice PLENIPOT.[39] These nine elected officials will directly govern the ITU and its permanent organs until the next PLENIPOT, to be held approximately in 1995. Being elected to one of these nine positions is prestigious to both the individual and to the sponsoring Member country. In an effort to garner additional information for U.S. preparations regarding the election of ITU officials at the Nice PLENIPOT, we ask for public comment in this area by way of the following questions:

a) Should the U.S. advocate changing the election of CCI Directors back to the Plenary Assemblies, as was the situation prior to the current ITU Convention? What factors should be considered in taking or not taking such a position?

b) Should the U.S. support any proposals at the Nice PLENIPOT to increase the membership of the IFRB to accommodate extra officers[40] Should the U.S. attempt to gain an IFRB membership if any are added?

23. *Principle of Rotation* : Within the ITU, the drive for increased representation and presence at higher leadership and influence positions by developing countries has increased within the last decade. Several means to achieve this end have been advanced: more equitable geographic distribution of position holders; an increase in the number of available positions; and application of the principle of rotation. While the latter item is not a "principle" per se, this is the catchphrase used within the ITU to mean limiting the time a particular individual or Member country could serve in these higher leadership positions.

24. There is at present no ITU limit on the number of terms that an incumbent in an elected position can serve, except that Article 9 of the ITU Convention provides that the Secretary-General and the Deputy Secretary-General are eligible for re-election once only. During the discussions at the Nairobi PLENIPOT, proposals to apply the principle of rotation to elected officials and membership on the Administrative Council, as well as limiting each ITU Member country to a single candidate for an elected position, were advanced as a way of providing more opportunities for wider ranging leadership participation in the activities of the Union.[41] Should the principle of rotation be applied to the elected positions of the ITU, the strength of incumbency for a continuing U.S. position would certainly be lost.[42] Applying the principle of rotation to the Administrative Council would diminish the presence of the larger financial contributors (including the U.S.) on the Council and could adversely affect U.S. interests.[43] Considering the potential impact on overall U.S. interests *vis - a - vis* the ITU, we consider this issue to be of prime importance for this conference.

25. *ITU Headquarters Structure* : The four permanent organs of the ITU are located at the ITU headquarters in Geneva, and while semi-autonomous, are dependent to a great degree upon common resources for administrative support (*e. g.* : physical meeting space; translation; interpretation; printing; computer support; etc.). While the Secretary-General is responsible for the overall operation of the ITU,[44] he receives advice and assistance on matters affecting more than one permanent organ through the medium of the Coordinating Committee.[45] Often, resource requirements for the autonomous missions of the four permanent organs conflict and require compromises where the priority work of one may suffer to accommodate the other. By way of addressing this general issue and developing information useful for the PLENIPOT preparatory process, the following questions are posed:

a) Does the present Federal System of the ITU Headquarters serve U.S. government and private sector interests? If so, how?

b) If a change in balance is considered necessary to better serve U.S. interests, what measures should be taken to either enhance the powers of the Secretary-General or to provide additional autonomy to the CCIR, the CCITT and/or the IFRB?

c) What factors favor or disfavor U.S. interests in the separate operations of the CCIR and the CCITT?

d) Should a proposal surface at the Nice PLENIPOT to combine the CCIR and the CCITT into a single entity, should the U.S. support or oppose such a move *AND* for what reasons?

e) Should there be any shift in the primary responsibility for mainframe computer resources so as to reflect approximations of actual usage within ITU units?

f) Should the authority and responsibility of the Coordinating Committee be amended to reflect a greater degree of balance and precision, or be altered in any other way?

g) Should the activities of the Centre for Telecommunications Development (CTD) become a functioning part of the ITU's Technical Cooperation Department (TCD)? What private sector impacts are foreseen?

26. *Future Program of Conference and Meetings* : The Nice PLENIPOT will establish a future program of conferences and meetings based upon input from previous conferences and the Administrative Council and other

proposals from ITU Member countries.[46] These conferences are of two basic types. The first is the World Administrative Radio Conference (WARC) which brings together ITU members from throughout the world to deal with matters affecting all ITU administrations.[47] This can be a particular subject or it can include a wide range of allocation questions as are considered in the General (or allocation) WARC's that have been held periodically, the last in 1979. The second is the Regional Administrative Radio Conference (RARC) which deals with a subject in the context of its application to one of the three ITU radio Regions.[48]

27. Each conference, within its area of competence, adopts Final Acts embodying the agreements which have been reached by the participating administrations.[49] The decisions of a WARC are applicable on a worldwide basis, but those of a RARC are applicable solely within that region. Even within that region, there are limitations, as one region has no power to establish standards governing another region. Often sharing criteria have to be developed by the IFRB to deal with possible impact outside the region. Even within the region, the RARC is more limited in its power to bind non-signatories. Thus, while a WARC has the power to adopt or amend the international Radio Regulations which are applied by the organs of the ITU to all administrations, a RARC has no such power, even within that region. Whether these distinctions should continue in their present form is considered at length elsewhere in this Notice of Inquiry. Here, the focus is on whether there is a need and priorities for possible future conferences.

28. In considering whether to support World or Regional conferences, there are several areas of concern to be considered. The first relates to whether, in fact, there is a need for such a conference. In addition, it is important to consider the likelihood that the outcome of such a conference would serve the interests of the United States. Merely because the subject appears to warrant inquiry, it does not follow that the possible gains outweigh the risks inherent in holding it. Likewise, substantial financial costs are entailed in the holding of any conference, and additional costs, often considerable, can be expected as a consequence of the decisions of such a conference. The United States has been an advocate of fiscal restraint in various international fora, including the ITU. As a major contributor to the ITU budget, the United States desires to avoid unnecessary or excessive expenditures.[50] However, it is not the purpose of this inquiry to seek comment on conference costs. Beyond costs and other administrative matters, there are substantive reasons to hold or not to hold a particular conference. This is the area where public participation and comment are needed.[51]

29. Current resolutions and recommendations of the ITU Radio Regulations and Final Acts of recent conferences reveal a potential list of possible conferences not yet scheduled:

> Another Session of the World Administrative Radio Conference for the planning of HF Bands allocated to the broadcasting service (HFBC) to be held possibly in the early 1990s;
>
> Another Session of the World Administrative Radio Conference on Mobile Services (MOB-WARC);
>
> A World Administrative Radio Conference for allocation of HF Bands to the broadcasting service to be held possibly in 1992 or later;

A General World Administrative Radio Conference to be held after 1990; and

> An ITU Plenipotentiary Conference to be held in 1995.[52]

Beyond these considerations, several possible issues that may influence the need for a future conference include:

> A possible call for new allocations or revision of the frequency allotment plan for the Aeronautical Mobile Service;
>
> The treatment of allotment planning and the multilateral planning meeting (MPM) issues in the Second Session of the Space WARC (ORB-2);
>
> Spectrum requirements to support space activities, such as a Manned Space Center and/or a Commercialization of Space Program;
>
> Mobile Satellite spectrum requirements (including feeder links);
>
> Satellite sound broadcasting spectrum requirements;
>
> Broadcasters' desire for additional HF spectrum;
>
> Realignment of existing Broadcast allocations or new allocations to accommodate new technologies (*i. e.*, High Definition TV); and
>
> Region 2 coordination for the effective use of FM and TV bands in the Americas.[53]

30. We believe that, mainly for budgetary reasons, only one major conference should be scheduled each year. Obviously, the greater the scope of a conference, the more preparation time and more resources (both government and private sector) are required. A conference empowered to potentially modify the entire set of Radio Regulations (a general allocation conference) would be very difficult for most ITU Member countries to address due to the panoply of potential issues involved and the manpower and financial resources required for preparation. Even though a large developed country like the United States could handle the preparatory effort relatively easier than a smaller, less developed country, such a general conference could have serious operational and economic consequences for U.S. telecommunication interests by placing a broad range of settled allocation and regulatory matters at risk in a single meeting.[54] In light of these concerns, we pose the following questions dealing with a program of ITU conferences for the 1989-1995 timeframe for public comment:

> a) Could the U.S. accept the scheduling of a general allocation conference in the 1989-1995 timeframe? If a general allocation conference appears unavoidable, should the U.S. argue for its scheduling beyond the 1995 period? Is favoring a general conference *vis - a - vis* a limited conference dependent upon whether governmental or non-governmental spectrum is under consideration?

b) Should the U.S. advocate the scheduling of a limited allocation conference in the 1989-1995 timeframe? How should such a conference be limited?

c) Is there a need for a Mobile conference in the 1989-1995 timeframe, with or without allocation authority? How should such a conference be limited?

d) Can the U.S. realistically limit a Mobile conference to a particular mobile (or mobile satellite) service in the 1-3 GHz band? Is some variant of this approach possible?

e) Should the U.S. support or oppose a separate aeronautical conference? Should the U.S. support placing the issues of compatibility between the aeronautical radio navigation service in the band 105-117.975 MHz and the broadcasting service in the band 87.5-108 MHz on the agenda of a conference in the 1989-1995 timeframe?

f) Is there a need for a Space conference in the 1989-1995 timeframe, with or without allocation authority? How should such a conference be limited?

g) Is a Third Session of the HFBC desirable from the standpoint of U.S. interests? If an HFBC planning conference is deemed necessary, should an HFBC allocation conference precede it? Should an HF conference be limited in some way (*e. g.*, all non-safety bands below 22 MHz)? What timeframes for HF conferences should be advocated?

h) What degree of consequential allocation authority should a particular conference be granted (*i. e.*, authority to delete and/or accommodate existing services in other portions of the spectrum)?

i) Should the U.S. advocate Region 2 conferences for coordination of FM and TV broadcasting bands? Should separate sessions be held? Are other Region 2 countries likely to participate effectively in such conferences?

31. *IFRB Technical Standards ; Consultation with Administrations* : Under the Radio Regulations, the IFRB is empowered to develop Technical Standards to deal with its work. In fact, the development of Technical Standards is a necessary extension of the Radio Regulations to the work of the IFRB, particularly as it relates to the study under Article 12 of the notifications filed with it. In this activity, the IFRB is guided by the decisions of World and Regional Conferences. Even so, there is considerable latitude in the development of standards to effectuate the decisions of a World Conference. In the case of a Regional Conference, this discretion is even broader, as the IFRB has the authority to develop standards that apply to non-signatories which do not choose to be bound by the provisions embodied in the Regional Agreement in question. Such standards may parallel those of the agreement or they may differ markedly. In the latter case, the effect of the standards can be to undermine the goals of the agreement. In such circumstances, it would be beneficial for affected administrations to participate in their development. Unfortunately, under current procedures, there are no set means to bring this about or even to ensure that the IFRB has served the will of administrations as expressed in the Final Acts of a Conference.

32. These are not merely theoretical concerns. The impact of the IFRB's Technical Standards can be of particular importance when they are used to decide whether a particular notification should be given a favorable finding. Notifications are judged in terms of their compliance with the ITU Convention and other applicable provisions, and are examined in terms of their potential for causing harmful interference. Even if the proposed operation would cause extensive interference under the standards of a Regional agreement, it may get entirely different treatment through application of the standards adopted by the IFRB. Not only can this lead to loss of the protection contemplated by the agreement, it conveys to this non-conforming proposal interference protection against other future notifications, even those that comply with the terms of the agreement.

33. Thus, while there is no doubt about the need for the IFRB to develop Technical Standards, a problem arises because of the lack of participation of administrations in this process. Although there is a theoretical remedy available through raising the matter at the next session of the Administrative Council, this offers no real opportunity to deal with what has become an accomplished practice. Even if the standards were changed, such a change would have no effect on the favorable findings made under the previous standards to which objection had been raised. Accordingly, it appears desirable to examine possible changes which could be proposed.

34. At the Second Session of HFBC, a resolution was adopted that dealt with this situation, at least in the area of short-wave broadcasting. As adopted, Resolution 514 requires the IFRB, when developing its Technical Standards, to consult administrations and to take their views into account unless it would be impossible to do so. Such a requirement was seen as offering important safeguards in this highly controversial area. However, it appears to be equally desirable to adopt such an approach regardless of the subject of the Technical Standards. Accordingly, comment is invited on the possibility of its adoption on an across-the-board basis.

35. *Status of Final Acts of Regional Conferences* : As matters now stand, there are important differences in the effect given to the Final Acts of World and Regional Conferences. World Conferences have the power to amend the Radio Regulations and thereby to effectively bind all administrations by their actions. Regional Conferences only have the power to take actions affecting that particular Region. But there is a further limitation on Regional Conferences which can be problematic. Although signatories to regional agreements are bound by their provisions, non-signatories are not unless they choose to be bound. In effect, this means that an administration can pursue its efforts at a Regional Conference and, if it is unsuccessful there, simply refuse to sign the Final Acts or to be bound by them. Because World Conferences are able to amend the Radio Regulations, they are in a position to have their decisions become effective world-wide, even as to non-signatories of the Final Acts, assuming no specific reservations are taken.

36. One possible way to deal with this situation is to have the Final Acts of a Regional Conference be given the same effect within the Region as the World Conference receives on a worldwide basis. In effect, this would mean that development of Regional Radio Regulations. Such an approach would have been of considerable value in connection with the AM conference in Rio de Janeiro in 1981

where Cuba walked out of the conference and has refused to be bound by its Final Acts. Even in less contentious situations, this approach may foster a greater commitment by administrations to participate in the process of developing effective agreements for use throughout the Region. Comments on this issue are invited.

37. *Basic Instrument of the Union* : Resolution No. 62 of the Nairobi PLENIPOT calls for the present ITU Convention to be separated into two instruments: (1) a Constitution with "fundamental character provisions; and (2) a Convention made up of the remaining provisions which might require revision at periodic intervals. Each of these instruments would have its own amendment procedure, with amendment of the Constitution requiring a special majority.[55] The ITU Administrative Council empaneled a group of experts to develop possible drafts to accomplish such a separation in the present ITU Convention and this group will provide its final report to the 43d Session of the ITU Administrative Council in June/July 1988.[56]

38. Under the present ITU Convention, all provisions are suseptible to amendment or deletion, and new provisions may be added, at every PLENIPOT. In effect, the entire treaty instrument is opened up every 5-6 years for possible change by a simple-majority vote. Other international treaty organizations have more stable, less malleable basic instruments. A complete description of the present ITU Convention and considerations for creation of a new basic instrument for the ITU would entail an extensive elaboration far beyond the limits of this Notice. We invite interested parties to comment on the following general questions:

a) What are the advantages/disadvantages for U.S. interests of the present ITU Convention versus a basic instrument as envisioned in Resolution No. 62 from the Nairobi PLENIPOT?

b) Should ratification of a new Constitution and a new Convention be accomplished, at least in the initial instance, as a package?

c) Should ratification of a new Constitution and a new Convention, or ratification of amendments thereto, include automatic acceptance of then existing Administrative Regulations?

d) What standard should be applied to amendment of either a new Constitution or a new Convention? What should constitute a "special majority"?

e) If a new Constitution and a new Convention are adopted, what affect, if any, is this likely to have on the scope, duration, and activities of future PLENIPOTS?

f) What should be the goals of the U.S. in approaching this subject at the Nice PLENIPOT?

39. *Reservations* : Article 77 of the ITU Convention provides that delegations of Member countries may take reservations to any decision of an ITU conference or meeting if such decision appears to be of a nature that would prevent that delegation's government from ratifying the Convention or from approving revisions to the Administrative Regulations. Such reservations may be final or provisional.[57] Articles 42 and 43 of the Convention, on the other hand, provide:

Article 42 - Administrative Regulations

170 1. The provisions of the Convention are supplemented by the Administrative Regulations which regulate the use of telecommunication and shall be binding on all Members.

2. Ratification of this Convention in accordance 171 with Article 45 or accession in accordance with Article 46 involves acceptance of the Administrative Regulations in force at the time of ratification or accession.

172 3. Members shall inform the Secretary-General of their approval of any revision of these Regulations by competent administrative conferences. The Secretary-General shall inform Members promptly regarding receipt of such notifications of approval.

173 4. In case of inconsistency between a provision of the Convention and a provision of the Administrative Regulations, the Convention shall prevail.

Article 43 - Validity of Administrative Regulations in Force

174 The Administrative Regulations referred to in No. 170 are those in force at the time of signature of this Convention. They shall be regarded as annexed to this Convention and shall remain valid, subject to such partial revisions as may be adopted in consequence of the provisions of No. 53 until the time of entry into force of new Regulations drawn up by the competent world administrative conferences to replace them as annexes to this Convention.[58]

40. Some ITU Member countries are reportedly interpreting Article 43 to the effect that reservations taken to Administrative Regulations at any particular conference will not remain in effect if not subsequently reiterated at the following PLENIPOTs or when signing or ratifying a new Convention. Since the U.S. has entered substantive reservations to the Final Acts or treaty documents emanating from many administrative conferences and has not always reiterated them at subsequent PLENIPOTs or in new Convention signings/ratifications, such an interpretation could have a significant impact on the U.S. public, especially telecommunications users and providers. Although we do not subscribe to such an interpretation, this matter warrants public comment, particularly from the private sector legal community.[59]

41. *Financing Technical Cooperation and Assistance* : There has been tremendous pressure on the ITU from developing countries to provide increased resources and technical assistance for their telecommunications infrastructures, especially since the Nairobi PLENIPOT and the amendments to Article 4 of the ITU Convention.[60] There are already provisions in the ITU regular budget for Technical Cooperation and Development (TCD) and funding for the newly established Centre for Telecommunications Development (CTD) comes mainly from private sector voluntary contributions, with some contributions from developed country governments. However, there may be suggestions surfacing at the Nice PLENIPOT, or at the November 1988 World Administrative Telegraph and Telephone Conference (WATTC-88), to create a fund for increased support of technical cooperation and telecommunications development for lesser developed countries by setting aside a portion of international telecommunications accounts settlements to be dedicated for this pur-

pose. We do not have specific details as to whether this would apply to all international settlements or only special types, whether a set percentage would be involved or a designated split of settlements in favor of LDCs, what limitations would be applied to the use of such a fund, who would administer such a fund or whether such a program would be voluntary or mandated in the Convention or in Administrative Regulations. However, considering the potential impact on U.S. telecommunication service providers and users, we request comments on these potential issues.

42. Finally, we invite commenters to submit any additional information or views they believe relevant to the subject matter of this inquiry and that may contribute to the preparatory process of the U.S. ITU PLENIPOT Delegation.

IV. PROCEDURAL MATTERS

43. Authority for this Notice of Inquiry is contained in Section 4(i), 303(r) and 403 of the Communications Act of 1934, as amended. Pursuant to applicable provisions set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before August 9, 1988, and reply comments on or before August 24, 1988. All submissions by parties to this proceeding or persons acting on behalf of such parties must be in written comments, reply comments or other appropriate pleadings. Reply comments must be served on the person(s) who filed comments to which the reply is directed. Pursuant to Section 1.1204(a)(4) of the Commission's Rules, no *ex parte* restrictions apply in this proceeding.

44. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and 5 copies of all comments, reply comments, pleadings, briefs or other documents shall be filed with the Secretary, Federal Communications Commission, 1919 "M" Street, N.W., Washington, D.C. 20554. All filings in this proceeding will be available for public inspection during regular business hours in the Docket Reference Room at the Commission's Washington, D.C. offices. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. The Commission may take into consideration ideas and information not contained in the comments, provided that such information or a writing indicating its nature and/or source is placed in the public file, or is otherwise publically available, and provided that the Commission's reliance on such information is noted in its written disposition of this proc eding.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] The International Telecommunication Union (ITU) is the United Nations specialized agency dealing with telecommunications. It is an international treaty organization currently composed of 164 Member countries, including the United States. The ITU Plenipotentiary Conference (PLENIPOT) is the "supreme organ" of the Union - the ultimate governing meeting of all Member countries which periodically meets to set the overall policies and direction of the organization concerned with international telecommunications. *See* , paragraphs 3-12, *infra*, for further description of the ITU and the PLENIPOT.

[2] Communications Act of 1934, as Amended, 47 U.S.C. Sections 151-611.

[3] The PLENIPOT is a meeting of ITU Member governments and is essentially political in nature. Although the U.S. Delegation to the PLENIPOT will primarily involve governmental representatives, a number of private sector individuals also will be included on the U.S. Delegation and deeply involved in U.S. preparatory activities. Information from this proceeding will provide a broader base of private sector input for the U.S. preparatory process.

[4] The current Administrative Regulations are composed of the international Telegraph Regulations, Telephone Regulations, Radio Regulations and Additional Radio Regulations. These regulations, along with the ITU Convention, are all binding treaty instruments to the extent reservations are not taken by Member Countries, as compared to International Telegraph and Telephone Consultative Committee (CCITT) Recommendations and International Radio Consultative Committee (CCIR) Recommendations, which are non-mandatory in nature and do not possess treaty status.

[5] *See* , ITU Convention, Article 4.

[6] *Id.*, Article 5. The Union's headquarters are located in Geneva, Switzerland, at the Place des Nations. The four permanent organs of the ITU are housed in the headquarters building.

[7] *Id.*, Articles 6 and 53.

[8] For allocation of frequencies and ease of reference the world has been divided into three Radio Regions. Generally, Region 1 includes Europe, Africa and all of the territory of the USSR; Region 2 includes all of the Americas and Greenland; and Region 3 includes Asia and Oceania. *See* , ITU Radio Regulations, Article 8 (Nos. 392-399) for specific boundaries of these three Regions.

[9] *See* , ITU Convention, Articles 7 and 54.

[10] *Id.*, Article 8 and 55.

[11] *Id.*, Articles 9 and 56.

[12] *Id.*, Article 10. This Article is the only one dealing with elected officials that specifically calls for equitable distribution of membership among the ITU administrative regions of the world. This provision mandates that only one elected IFRB member may be elected from each of these regions: (1) The Americas; (2) Western Europe; (3) Africa; (4) Eastern Europe and Northern Asia; and (5) Asia/Australia. However, this Article also provides that the elected IFRB members shall not represent their respective countries or the region from which they are elected. *See also*, Article 57.

[13] *Id.*, Articles 11, 58 and 68-76.

[14] Beginning with the 1989 PLENIPOT, the Directors of the CCIs will be elected at the PLENIPOT rather than at their respective Plenary Assemblies. *See* , ITU Convention, Article 11, para. 3(c). With respect to ITU elections generally, Article 13 of the ITU Convention provides that the nine elected senior officials shall be nationals of different countries. Historically, there also has been a practice that if the elected Secretary-General is from a developed country, then the Deputy Secretary-General is from a developing country and vice-versa.

[15] An Administration is the governmental department responsible for discharging the obligations undertaken in the ITU Convention and the Administrative Regulations. *See* , ITU Convention, Annex 2, No. 2002.

[16] While the Commission deals primarily with non-governmental spectrum allocation and frequency assignments, the National Telecommunications and Information Administration (NTIA) is the Executive Branch agency responsible for allocation and assignment of U.S. Governmental use of spectrum. However, all notifications and coordinations with the ITU are handled through the Commission.

[17] Other government agencies and staff participate as their interest in a specific meeting or conference dictates. And, in addition to U.S. Delegation preparations for a specific ITU meeting or conference, several Federal Advisory Committees have been established pursuant to the Federal Advisory Committee Act to provide private sector input to various ITU preparatory activities, including: the U.S. National Committee for CCIR; the U.S. National Committee for CCITT; the Mobile WARC Advisory Committee; the Space WARC Advisory Committee; etc.

[18] *See* , REPORT ON THE ACTIVITIES OF THE UNION, Addendum 2 to Document 6600 of the 42d Session of the ITU Administrative Council (June 1987). (This is the latest definitive information currently available.) The principle of geographic distribution for ITU staff applies to senior counsellors, professional category (excluding language staff) and technical posts. As of January 1, 1987, the total compensable ITU staff numbered 750.

[19] The Head of the U.S. Delegation was named from the private sector and accorded the personal rank of Ambassador by the President. The remainder of the U.S. Delegation consisted of twenty federal participants from various parts of the Executive Branch and the Commission and seven private sector advisers. The Delegation was assisted by a twenty-one member support staff (governmental and private sector mixed) and there were seventeen senior corporate executives from the U.S. private sector in attendance.

[20] The USTTI was and continues to be an important unilateral U.S. initiative developed by the private sector, with modest government support, to provide free telecommunications training to applicants from developing nations.

[21] *See* , Resolution No. 74 of the Nairobi PLENIPOT. In addition, the Nairobi PLENIPOT adopted Resolution No. 14, which continues the exclusion of the Government of the Republic of South Africa from all conferences and meetings of the ITU.

[22] *See* , Report of the United States Delegation to the Plenipotentiary Conference of the International Telecommunication Union (Nairobi, Kenya, 1982), at 6-8. For further detailed information on the Nairobi PLENIPOT, beyond the overview in this Notice of Inquiry, we will place a copy of that Report in the public docket file of this proceeding.

[23] The seven ITU officials elected at the Nairobi PLENIPOT are listed in paragraph 12, *supra*. Starting with the 1989 PLENIPOT, the Directors of the two CCIs will also be elected at the PLENIPOT.

[24] *See* , ITU Convention, Article 8.

[25] *See* , ITU Convention, Article 4. This phrase is understood as an attempt to redirect the technical focus of the ITU and to create a presumption of favoring ITU financing of technical assistance to less developed countries.

[26] *Id.*, Article 15. Under the voluntary contribution system, the U.S. subscribes to 30 contributory units, approximately 7% of the ITU annual budget. Under the UN Scale, the U.S. would be assessed approximately 25% of the ITU annual budget.

[27] *See* , Additional Protocol I of the Nairobi conference.

[28] *See* , ITU Convention, Article 6. The interval between the 1973 Malaga-Torremolinos PLENIPOT and the 1982 Nairobi PLENIPOT had been nine years.

[29] *See* , Resolution No. 1 of the Nairobi PLENIPOT. Appendix A of this Notice of Inquiry contains a listing of the ITU conference program established by Resolution No. 1.

[30] *See* , ITU Convention, Article 33. While this new phrase does not restrict U.S. access to the GSO, it could suggest a preference in the use of the GSO and could eventually result in troublesome demands by some countries regarding the use of this important international resource.

[31] *See See* , Resolution No. 62 of the Nairobi PLENIPOT.

[32] *See* , Resolution No. 68 of the Nairobi PLENIPOT.

[33] *See* , Resolution No. 69 of the Nairobi PLENIPOT. This resolution also called for the establishment of a voluntary group of experts to advise and assist in monitoring such implementation.

[34] *See* , ITU Convention, Final Protocol (Nos. 70, 104 and 111). The text of the U.S. statements is set forth in Appendix B of this Notice of Inquiry. The U.S. ratified the ITU Convention by depositing instruments of ratification with the ITU on January 10, 1986, and in so doing, reconfirmed the text of the statements in the Final Protocol.

[35] *See* , Resolution No. 2 of the Nairobi PLENIPOT.

[36] *See* , Report by the Secretary-General, 43d Session of the ITU Administrative Council, Document 6703 (February 1988).

[37] Resolution No. 34 of the Nairobi PLENIPOT, *resolves*.

[38] *See* , listing of positions and incumbents at paragraph 12, above.

[39] *Id.*, at 58. Such proposals surfaced at the 1982 PLENIPOT, but were not adopted.

[40] *Id.*, at 56-60. Such proposals sought to achieve greater balance, geographical distribution and opportunities for elective office.

[41] We note that Resolution No. 56 of the Nairobi PLENIPOT, dealing with election of members of the IFRB, calls for an Administrative Council study and proposals from Member countries to the next PLENIPOT on how to achieve rotation of IFRB members and, at the same time, ensure a degree of continuity of IFRB functions. The subject of rotation was discussed within the ITU Group of Experts studying the Long Term Future of the IFRB, but the Final Report of that Group of Experts indicates varying views on limiting the terms of IFRB membership with no definitive recommendation of the group. *See* , ITU Administrative Council (43d Session) Document No. 6737, 25 April 1988.

[42] Guidance and direction of ITU activities via the Administrative Council is extremely important, considering the responsibilities of this body (setting conference agendas; approving staffing; allocation of resources and annual budget approval). *See* , paragraph 8, above.

[43] *See* , ITU Convention, Article 9.

[44] *Id.*, Article 12. The Coordinating Committee consists of the Secretary-General, the Deputy Secretary-General, the Directors of the CCIs and the Chairman and Vice-Chairman of the IFRB. The Coordinating Committee also considers other matters entrusted to it under the Convention or referred to it by the Administrative Council.

[45] The Nairobi PLENIPOT established a schedule of fifteen conferences for the period 1983-1989, a list of which is contained in Appendix A of this Notice of Inquiry for information.

[46] For ease of discussion, we only mention WARCs here. In actuality, World Administrative Conferences are also scheduled for Telegraph and Telephone: *i. e.*, the WATTC.

[47] While there are five administrative regions for ITU purposes, *see* footnote 12, above, there are only three ITU radio Regions, *see* footnote 8, above.

[48] Not all administrations participate in these conferences, but typically, a larger percentage of eligible administrations attends a WARC than attends a RARC.

[49] We expect that the U.S. will again generally argue for a selective conference schedule, with individual conferences limited in duration, in order to keep down ITU and Member country expenses. *See* the description of discussions on conferences at pages 69-72 of the U.S. Delegation Report of the Nairobi PLENIPOT.

[50] In this regard, we note that the governmental Interdepartment Radio Advisory Committee (IRAC) has established an Ad Hoc Committee which is actively working on U.S. position on future conferences.

[51] We note that two conferences impacting the U.S. yet to be concluded, and one just concluded, may result in possible further requirements: (1) Second Session of Region 2 Planning Conference for Broadcasting in the Band 1605-1705 kHz (Rio de Janeiro, 2 May - 9 June 1988); (2) Second Session of the Space WARC (Geneva, 29 August - 5 October 1988); and (3) the World Administrative Telegraph and Telephone Conference (WATTC-88) (Melbourne, 28 November - 9 December 1988).

[52] *See* , Appendix C of this Notice of Inquiry for detailed discussion of Broadcasting Conference matters: HF and regional considerations for FM and TV.

[53] Social consequences of attendant confrontations associated with telecommunications requirements, as well as political positions of differing Member countries having nothing to do with telecommunications matters, are more likely to come to the fore at a general conference, which also increases the burdens and risks of such conferences.

[54] *See* , Resolution No. 62 of the Nairobi PLENIPOT.

[55] *See* , FINAL REPORT OF THE GE-BIU TO THE 43RD SESSION OF THE ADMINISTRATIVE COUNCIL, (Geneva, 29 January 1988). We will place a copy of this report in the public docket file of this proceeding for further information of interested parties.

[56] *See* , ITU Convention, Article 77.

[57] *Id.*, Article 42 and Article 43. The reference to "No. 53" in Article 43 is to the ability of an administrative conference having the authority to partially revise Administrative Regulations.

[58] In a related matter, the question of the application of the Vienna Convention on the Law of Treaties to reservations taken by ITU Member countries at ITU Conferences has recently arisen. At a meeting of the Maritime Safety Committee of the International Maritime Organization (London, April 1988), the Government of Greece asserted that Reservation No. 51 at the ITU 1987 Mobile WARC was not valid under Articles 19, 20 and 21 of the Vienna Convention. This reservation rejecting imposition of rigid telecommunication maintenance personnel obligations aboard certain ships, was jointly taken by the United States and twenty-two other countries. While the U.S. has not ratified the Vienna Convention, many of the 22 other reserving countries have. If there is a question that the Vienna Convention may affect the status of this important reservation, or any other reservation to ITU agreements, the Nice PLENIPOT should provide an opportunity to clarify the issue. Public comment on this related issue is welcomed.

[59] *See* , paragraph 17, above.

Appendix A

Schedule of ITU Administrative Conferences established at the Nairobi PLENIPOT

1. World Administrative Radio Conference for Mobile Services (Geneva, 28 February - 18 March 1983);

2. Regional Administrative Radio Conference for the Planning of the Broadcasting-Satellite Service in Region 2 (Geneva, 13 June - 15 July 1983);

3. First Session of the World Administrative Radio Conference for the Planning of HF Bands Allocated to the Broadcasting Service (January 1984, for 5 weeks);

4. Second Session of the Regional Administrative Conference for FM Sound Broadcasting in the VHF Band (Region 1 and certain countries concerned in Region 3) (end of October 1984 for 6 weeks);

5. First Session of the World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and the Planning of the Space Services Utilizing It (end of June to mid-August 1985, for 6 weeks);

6. First Session of the Regional Administrative Planning Conference for the Broadcasting Service in the Band 1 605 - 1 705 kHz in Region 2 (first half of 1986, for 3 weeks);

7. Second Session of the World Administrative Radio Conference for the Planning of HF Bands Allocated to the Broadcasting Service (October-November 1986, for 7 weeks);

8. First Session of the Regional Administrative Conference to Review and Revise the Provisions of the Final Acts of the African VHF/UHF Broadcasting Conference (Geneva, 1963) (first half of 1987, for 3 weeks);

9. World Administrative Radio Conference for Mobile Services (mid-August to end of September 1987, for 6 weeks);

10. Regional Administrative Conference to Establish Criteria for the Shared Use of the VHF and UHF Bands

Allocated to Fixed, Broadcasting and Mobile Services in Region 3 (end of November 1987, for 4 weeks);

11. Second Session of the World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and on the Planning of Space Services Utilizing It (end of June - beginning of August 1988, for 6 weeks);

12. Second Session of the Regional Administrative Planning Conference for the Broadcasting Service in the Band 1 605 - 1 705 kHz in Region 2 (third quarter of 1988, for 4 weeks);

13. World Administrative Telegraph and Telephone Conference (beginning of December 1988, for 2 weeks) (see Resolution No. 10);

14. Plenipotentiary Conference (beginning of 1989, for 6 weeks); and

15. Second Session of the Regional Administrative Conference to Review and Revise the Provisions of the Final Acts of the African VHF/UHF Broadcasting Conference (Geneva, 1963) (September 1989, for 4 weeks);

Appendix B

Statements issued by the U.S. in the Final Protocol of the ITU Convention at the Nairobi PLENIPOT

70

For the United States of America:

The United States of America, deeply troubled by developments at the 1982 ITU Plenipotentiary Conference, reserves the right to make appropriate specific reservations and statements prior to ratification of the ITU Convention. The general concern of the United States of America is based on the Union's regrettable and pervasive lack of realistic fiscal planning, the politicization of the Union, and a requirement that the Union provide technical cooperation and assistance which should be appropriately provided through the United Nations Development Programme and the private sector. This reservation is necessarily general in nature due to the Conference's inability to complete its substantive work by the time required for submission of reservations.

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For the Federal Republic of Germany, Australia, Austria, Belgium, Canada, Denmark, the United States of America, Finland, France, Greece, Iceland, Italy, Japan, the Principality of Liechtenstein, Luxembourg, Monaco, Norway, New Zealand, Papua New Guinea, the Kingdom of the Netherlands, Portugal, the United Kingdom of Great Britain and Northern Ireland, Sweden and the Confederation of Switzerland:

The above-mentioned Delegations, referring to the reservation made by the Republic of Colombia, the People's Republic of the Congo, Ecuador, the Gabonese Republic, the Republic of Indonesia, the Republic of Kenya, the Republic of Uganda and the Somali Democratic Republic in Statement No. 90, consider that, inasmuch as this statement refers to the Bogota Declaration of 3 December 1976 by equatorial countries and to the claims of those countries to exercise sovereign rights over segments of the geostationary-satellite orbit, the claims in question cannot be recognized by this Conference. Further, the above-mentioned Delegations wish to reaffirm the declaration made on behalf of their Administrations in this regard when signing the Final Acts of the World Administrative Radio Conference (Geneva, 1979).

The above-mentioned Delegations also wish to state that reference in Article 33 to the "geographical situation of particular countries" does not imply a recognition of claim to any preferential rights to the geostationary orbit.

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For the United States of America:

The United States of America, noting the statement (No. 69) entered by the Administration of Cuba, recalls its rights to broadcast to Cuba on appropriate frequencies free of jamming or other wrongful interference and reserves its rights with respect to existing interference and any future interference by Cuba with United States broadcasting.

Appendix C

Broadcasting Conferences: Detailed Discussions

1. High Frequency Broadcasting Planning. In 1984, the First Session of HFBC directed the International Frequency Registration Board to perform extensive intersessional work of the development of a computerized method of planning for the high frequency bands allocated to broadcasting. This approach had been supported by many of the developing countries which sought to adopt this new planning method as a replacement for the existing approach in Article 17 of the Radio Regulations under which frequency use is coordinated. Although it did not believe that the proposed planning method would provide satisfactory results, the U.S. did agree to the further study of the planning methodology in the period following the First Session of the Conference. When the results of the IFRB's work were reported to the Second Session in 1987, they confirmed the view of the U.S. as to its unworkability. Although support for the new method remained strong, there was a recognition of the fact that the proposed planning method could not be adopted as is. Accordingly, the Second Session called for further work to be performed by the IFRB and for a comparison to be made of the results of the two methods. The stated contemplation was that the results would be examined at a conference to be scheduled, perhaps in 1992.

2. Based on its understanding of the nature of the proposal and of the IFRB work to date, the U.S. remains convinced of the lack of utility of the proposed method. Nonetheless, in view of the decisions of HFBC, such a conference is likely. In addition to any comments on whether the conference itself should be scheduled, parties are invited to indicate their views on the date for such a conference, that is whether it should be held in 1992 or at some later date.

3. High Frequency Broadcasting Allocation. At both the First and Second Sessions of HFBC, considerable attention was paid to the high degree of congestion in the high frequency bands allocated exclusively to broadcasting. As a result, a Resolution was adopted at the Second Session of HFBC inviting the Plenipotentiary Conference to consider scheduling a conference to examine a possible reallocation of spectrum to provide more frequencies for broadcast use. These would be in addition to those made available in the future through the actions of the General WARC in 1979.[1]

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1 Questions remain unresolved regarding the use of these frequencies. The Final Acts of HFBC 1987 have delayed the use of these frequencies pending further consideration of the proposed planning method, presumably at the 1992 conference.

Although there is no doubt about the degree of congestion in the HF bands now used for broadcasting, the possibility of reallocating additional spectrum involves many other uses and cannot ignore the impact any such reallocation would have. In addition, such reallocations always involve substantial dislocations as users are forced to find other spectrum for their use. Costs also are substantial, the more so in the case of developed countries like the United States where there are many operations that would be affected by any such reallocation. In view of the conflicting needs involved, should such a conference be scheduled? If so, what subjects should it consider? How broad should be its mandate to consider possible reallocations? When should such a conference be held?

4. Regional FM and TV Conferences. In 1980 and 1981, Region 2 held a two-session medium frequency (AM) conference that established standards for use throughout the region. Although not all countries have participated in the arrangements contemplated under the Final Acts adopted in Rio de Janeiro in 1981, this agreement has provided a framework for the resolution of many of the incompatibilities in the uses of the AM band in Region 2. Similarly, a two-session conference was held in 1986 and 1988 to deal with ten additional frequencies involved in the expansion of the AM band. The Second Session of this conference took place in Rio in May and June of 1988.

5. The United States, and in particular the FCC, has been an active participant in these conferences and in the work that has grown out of them to give full effect to their decisions. This has led to substantial benefits for the United States, both in terms of U.S. broadcasting and in terms of better relations throughout the region. However, to date, no similar framework exists for the use of either FM or TV channels in Region 2. Instead, the U.S. has had to deal with its neighbors bilaterally. New arrangements have been negotiated with Canada and similar negotiations have begun with Mexico. On the other hand, no arrangements now exist with the other countries with which coordination might be required for the most effective use of these bands. In fact, elsewhere in the region, the need for a framework for dealing with this situation is far greater, and considerable interest has been expressed in holding such conferences. At such a conference, the FCC and others in the U.S. could provide important technical support and could help ensure the adoption of standards harmonious with use of the band as contemplated in the U.S.

6. Because of the need for separate treatment, it appears likely that separate FM and TV conferences would be scheduled. However, as both services are far less complicated than AM broadcasting, it is not likely that more than a single session would be required for each conference. Comments are sought on whether to support the holding for such conferences and if so whether separate single-session conferences represent the most appropriate approach.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Exchange Carrier
Association, Inc.

Tariff F.C.C. No. 1 Transmittal No. 290

ORDER

Adopted: April 28, 1988 ; Released: May 2, 1988

By the Chief, Common Carrier Bureau:

1. On March 15, 1988, the National Exchange Carrier Association (NECA) filed the above-referenced transmittal, which adds tariff language providing for rules and procedures governing the disconnection of jointly provided access service. The tariff is scheduled to take effect April 29, 1988.

2. On March 30, 1988, MCI Telecommunications Corporation (MCI) filed a petition for clarification requesting that NECA address combined-use access service situations in which disconnection may be imposed because a customer has paid the intrasate portion of its account, but has not paid the interstate portion. MCI is concerned that Transmittal No. 290 may allow the discontinuance of service in a case in which there is a dispute over an interstate account.

3. NECA filed a reply on April 12, 1988, stating that Transmittal No. 290 does not change the rules governing the circumstances under which a telephone company may discontinue a customer's service, but rather how it may do so. NECA maintains that Transmittal No. 290 does not affect the existing provisions on this subject.

4. The Commission's Rules do not authorize the filing of such a petition for clarification. The petition therefore should be dismissed as an unauthorized pleading.

5. IT IS THEREFORE ORDERED that the petition for clarification filed by MCI Telecommunications Corporation in response to Exchange carrier Association Tariff F.C.C. No. 1, Transmittal No. 290, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications

Revisions to Tariff F.C.C.	Transmittal Nos. 1129, 1175, Nos. 1, 2, 4, 7, 9, 11, and 1246 12, and 14

ORDER

Adopted: June 17, 1988 ; Released: June 20, 1988

By the Deputy Chief, Common Carrier Bureau:

1. On February 9, 1988, AT&T Communications (AT&T) filed Transmittal No. 1129 to comply with the Commission's requirement that tariffs complying with Comparably Efficient Interconnection (CEI) requirements be effective before a carrier may offer an enhanced service.[1] This transmittal was revised by Transmittal No. 1175, filed on April 1, 1988. Transmittal No. 1175 modified language contained in Transmittal No. 1129 and also added language, including several definitional changes. MCI Telecommunications Corp. (MCI) and the Independent Data Communications Manufacturers' Association, Inc. (IDCMA) filed petitions to reject or to suspend and investigate both of these transmittals.[2] AT&T replied to these petitions. [3]

2. On June 3, 1988, AT&T filed Transmittal No. 1246, to revise Transmittal 1175 further. MCI and IDCMA submitted letters indicating that they would not oppose this transmittal.[4] The three transmittals at issue here are all scheduled to become effective on June 22, 1988.

3. By Transmittal 1129, AT&T proposed to establish a central office connection rate element to enable the physical interconnection at an AT&T central office between AT&T's tariffed services and its own enhanced service equipment. This physical interconnection would provide the AT&T enhanced service, "Transaction Services."[5] Petitioners claimed that the language of Transmittal 1129 would enable, at AT&T's discretion, the physical interconnection of non-AT&T, customer-owned equipment at an AT&T Central Office, *i. e.*, discriminatory collocation of customer-owned equipment. The language primarily at issue specified that the Transaction Services rate element would permit the interconnection at an AT&T central office of AT&T's tariffed services with other AT&T services, including AT&T enhanced services, or " *with customer - owned equipment.* " (emphasis added). *See , e. g.*, AT&T Communications, Tariff F.C.C. No. 9, Transmittal No. 1129, Section 3.3.2.

4. In Transmittal 1175, AT&T revised several definitions proposed in Transmittal 1129. Those revisions, however, further suggested to petitioners that customer-owned equipment might still, at AT&T's discretion, be physically located at an AT&T site. This suggestion was created principally by AT&T's revision of the term "Customer Premises" to mean "a Customer-*designated* premises, which may include that portion of an AT&T premises which is not an AT&T Central Office." (emphasis added). *See , e. g.*, AT&T Communications, Tariff F.C.C. No. 9, Transmittal No. 1175, Section 2.10.

5. AT&T, in Transmittal 1246, has now removed the specific language in its definitions which petitioners found objectionable. Thus, what remains before the Bureau is AT&T's establishment of its central office connection rate element, which allows AT&T to offer its enhanced service. No petitions were filed against this aspect of the transmittal.

6. The Common Carrier Bureau has reviewed AT&T's Transmittal Nos. 1129, 1175, and 1246, as well as the petitions and letters of MCI and IDCMA and AT&T's replies. In view of the revisions made by AT&T, we do not find AT&T's transmittals to be patently unlawful so as to require rejection nor do we find that an investigation is warranted at this time.

7. Accordingly, IT IS ORDERED that the petitions to reject or to suspend and investigate filed against AT&T Communications Tariff F.C.C. Nos. 1, 2, 4, 7, 9, 11, 12, and 14, Transmittal Nos. 1129 and 1175 filed by MCI Telecommunications Corp. and the Independent Data Communications Manufacturers Association, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Third Computer Inquiry, 104 FCC 2d 958, 1055 (1986). *See also* AT&T Comparably Efficient Interconnection Plan for Transaction Services, Memorandum Opinion and Order, DA 88-671, released May 11, 1988.

[2] MCI Petition To Reject or, in the Alternative, To Suspend and Investigate, AT&T Transmittal No. 1129, filed Feb. 24, 1988; MCI Petition To Reject, AT&T Transmittal No. 1175, filed Apr. 18, 1988; IDCMA Petition To Reject or, in the Alternative, To Suspend and Investigate, AT&T Transmittal No. 1129, filed Feb. 24, 1988; IDCMA Petition To Suspend and Investigate, AT&T Transmittal No. 1175, filed Apr. 18, 1988.

[3] Reply of American Telephone and Telegraph Company, AT&T Transmittal No. 1129, filed Mar. 7, 1988; Reply of American Telephone and Telegraph Company, AT&T Transmittal No. 1175, filed Apr. 28, 1988.

[4] MCI Letter to Chief, Common Carrier Bureau, June 9, 1988; IDCMA Letter to Acting Secretary, Federal Communications Commission, June 10, 1988.

[5] "Transaction Services" is an enhanced service that allows on-line, point of sale communications between a merchant's sales terminal and banks or other financial database services.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 83-1145

Released: May 23, 1988

Cincinnati Bell Telephone Company
c/o David C. Olson
Frost & Jacobs
2500 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202-4182

Re: Refund of Inside Wiring Charges

Dear Mr. Olson:

This letter is in response to your June 3, 1987, letter to Mr. Daniel Grosh of the Tariff Division requesting clarification of paragraph 29 and footnote 34 of the Commission's Order in CC Docket No. 83-1145, Investigation of Access and Divestiture Related Tariffs.[1] As you are aware, MCI Telecommunications Corporation (MCI) has filed an opposition to your request for clarification.

We understand from your letter that Cincinnati Bell intended to comply with the Commission's directive to provide refunds to access customers who had filed for refunds of inside wiring charges prior to August 31, 1986. You acknowledge that MCI filed for a refund in a timely fashion. You assert that while a petition to vacate the refund requirement was pending, Cincinnati Bell was revising its mechanized billing program so that it could pay the refunds by February 1, 1987, in order to comply with the Commission's refund requirement. Finally, you interpret the *December 1986 Order* as directing Cincinnati Bell "to cease processing of any refunds not already paid."

In its opposition, MCI relies on footnote 34 of the *December 1986 Order* in which the Commission states that it would not require the local exchange carriers (LECs) "to adjust for amounts already refunded or paid to customers." It believes that the Commission assumed that the LECs had already paid refunds for which their customers had submitted requests. MCI states that it had complied with the reporting requirements of that Order, and claims that Cincinnati Bell should have paid the refund by December 1, 1986. MCI concludes by asserting that that paragraph 29 of the *December 1986 Order* applies to inside wire rate recovery on a prospective basis only.

The Commission resolved the question of inside wiring charge refunds in its *December 1986 Order* by vacating the refund requirement and allowing LECs to charge all special access users for the costs of inside wiring. 2 FCC Rcd at 342. The Commission emphasized that its decision to vacate portions of the *Inside Wiring Order* [2] applied to pending requests for refunds. *Id.* The Commission noted that to require the LECs to respond to requests for refunds already on file would substantially defeat the purpose of its rescission of the refund requirement, and could create customer confusion and dissatisfaction.

We have reviewed your letter, MCI's opposition, and the Orders that form the basis for both parties' contentions. We disagree with MCI's interpretation of footnote 34 in the *December 1986 Order*. Our interpretation of that footnote and paragraph 29 of that Order leaves little doubt that the Commission intended to leave the refund situation as it stood on the date the Order was released. Therefore, we conclude that Cincinnati Bell need not refund any charges to MCI for inside wiring. This view, of course, represents only an informal staff opinion, not a final decision by the Bureau or the Commission.

Sincerely,

John Cimko, Jr.
Chief, Tariff Division
Common Carrier Bureau

cc: MCI Telecommunications Corporation

FOOTNOTES

[1] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, 2 FCC Rcd 339 (1986) (*December 1986 Order*).

[2] Investigation of Access and Divestiture Related Tariffs, 102 FCC 2d 1007, 1037-39 (1985) (*Inside Wiring Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 84-467

In the Matter of

Preparation for an International
Telecommunication Union Region 2
Administrative Radio Conference
for the Planning of Broadcasting
in the 1605-1705 kHz Band

FOURTH NOTICE OF INQUIRY

Adopted: February 25, 1988; Released: June 3, 1988

By the Commission:

INTRODUCTION

1. This proceeding was begun in 1984 to develop a record to assist the Commission in its preparations for the First Session of the above-captioned international Conference on the use of the expanded AM band from 1605 kHz to 1705 kHz.[1] For this purpose, two *Notices of Inquiry* were issued inviting comments by interested parties.[2] Two *Reports* concluded this phase of the proceeding with the adoption of FCC recommendations regarding the technical criteria to be applied to broadcasting in the expanded band as well as the method for planning the band.[3] To prepare for the Second Session of the Conference,[4] which is to develop the final text for a Regional Agreement as well as the associated Broadcasting Plan,[5] a *Third Notice of Inquiry* was adopted.[6] After studying the record developed in response to this latter *Notice* and through other Conference preparatory activities, the Commission recently adopted a *Third Report* recommending, among other things, a revised version of the text for the Final Agreement.[7]

2. At this stage of the proceeding, a Fourth Notice of Inquiry is appropriate to aid in developing a record for the domestic implementation of broadcasting in the 1605-1705 kHz band. By choosing to discuss these issues now, rather than waiting until the Second Session of the Conference is concluded, the Commission can foster the earliest introduction of broadcasting in the expanded band.

3. Because new spectrum is to become available through expansion of the existing AM band, we are faced with the question of whether to proceed along the lines utilized in the existing AM band or whether it would be preferable to adopt a fundamentally different regulatory scheme, or perhaps, whether we should use a combination of both schemes. As described below, adoption of a new approach could make it possible to offer licensees much greater latitude in responding to market considerations, thereby enabling them to better respond to public needs and wants. We desire to explore such an alternative and to determine whether to adopt a system offering substantially less governmental oversight than that involved in the current method.

4. In this *Notice*, we will discuss all three alternatives, in each instance identifying the international considerations which may bear upon the choice of approach. In addition, there are some technical attributes relating to operation on these frequencies which also may have a bearing on our decision. These matters will be discussed generally as well as in connection with the topics to which they apply. However, before discussing the issues being raised for comment, some background information will be provided to place the subject matter in focus.

BACKGROUND

5. *The First Session.* The Commission's *First Notice* in this proceeding sought public comment on a wide variety of issues relating to the most effective use of the new spectrum. Many of these were technical issues concerning such matters as power limits, protection requirements and signal propagation. Also to be considered was the type, extent and location of U.S. "requirements" so that international protection would be obtained for them. The disposition of current domestic users of this band, as well as new broadcast uses, also was a matter for consideration.

6. After considering information gained through Commission participation in various domestic and international meetings and study groups, and after reviewing the record in response to the *First Notice*, the Commission refined its views.[8] Its belief that the new band should be treated as an extension of the existing AM band rather than a separate band was detailed as a "preliminary view" in the *Second Notice*. In addition, comment was sought on issues not yet resolved, most significantly the planning method for use of the expanded band.

7. Two Commission *Reports* concluded the FCC's preparations for the First Session. The *First Report* dealt with most of the technical issues to be considered at the First Session, except for the planning method to be used. The FCC specifically recommended that the technical criteria contained in the Regional Agreement for the Medium Broadcasting Service in Region 2 for the existing AM band (535-1605 kHz) generally should be applied to the expanded band at 1605-1705 kHz to the maximum extent possible in recognition of the fact that the new frequency band is best considered as an extension of the existing band. Such an approach promotes the earlier availability of receivers capable of receiving the extended band, which in turn fosters the early commencement of service on those frequencies in Region 2.[9]

8. In the *Second Report*, the Commission recommended that the United States propose to the Conference that allotment planning, rather than assignment planning, be used for the new AM band 1605 KHz to 1705 kHz.[10] Under an assignment plan, an assignment for each station is entered into the plan with a specific location, power and other pertinent characteristics whereas, an allotment plan makes designated frequencies available for use anywhere within a specified area. Allotment planning offers more flexibility while helping to ensure an efficient and equitable distribution of channels. Since an allotment plan avoids the need to identify specific requirements it provides a mechanism to protect future rights without the need to identify them in advance.

9. The U.S. proposals provided a foundation for much of the work of the First Session, and U.S. views were followed in all major regards. This included technical standards for the band 1605-1705 kHz consistent with those applied to the existing AM band, and adoption of an allotment planning method. Rather than require the specification of facilities, the allotment plan is framed in terms of the effect on other allotments. Not only does this simplicity permit changes in location of station facilities, it permits multiple uses within allotment areas provided that requisite international protection is provided. The allotment method can preserve the rights of the administrations to develop broadcast operations in the future at times of their choosing.

10. *Preparations for the Second Session.* In order to prepare for the Second Session, the Commission adopted a *Third Notice of Inquiry* inviting comments on international issues concerning, among other things, technical standards, the draft agreement and Travelers Information Stations (TIS). In addition, the Commission is involved in several types of conference preparatory activities which are taking place during this intersessional period. For instance, the Industry Radio Advisory Committee and its technical and allocations Subgroups have resumed their consideration of expanded band issues. Also, both the CCIR and the International Frequency Registration Board (IFRB) are performing intersessional studies in preparation for the Second Session of the Conference.[11] Although most issues relating to the allotment planning method have been resolved, the method is being further refined by the IFRB. One of the Board's tasks is to develop a map for Region 2 which depicts the allotment areas. Additionally, the IFRB is performing studies related to the standardized distances that are to be employed for mixed land/sea paths.

11. The *Third Report*, recently adopted, addressed the need to refine the draft agreement developed by the First Session of the Expanded Band Conference. The scope of the draft was limited by the agenda of the First Session to embrace only the use of the expanded band by the broadcast service. Subsequently, the Second Session has been empowered to develop regulatory procedures governing the use of the band by other services in Region 2.[12] Accordingly, the draft agreement must be revised to deal with this by defining the relationship between the allotments in the broadcast service and the permitted services, fixed and mobile.

12. The issue of the text for the final agreement had been discussed internationally at the recent Lima meeting of CITEL PTC II, where a revised draft text was introduced for discussion by a member of the IFRB. The revisions in the earlier text were designed to deal with non-broadcast as well as broadcast uses of the band. Although no decision as such was made regarding this text, it met with general support by the countries attending the CITEL meeting. Since the Commission believes that this text with minor revisions is appropriate for adoption at the Second Session, it adopted the revised text which will be forwarded as an FCC recommendation for a United States proposal to the Second Session. The recommended agreement text was attached as an appendix to the *Third Report*. This was the only area for which a specific recommendation was thought warranted.

13. Two technical issues remained unresolved at the conclusion of the First Session of the Expanded Band Conference. They involved the relationship between electrical and physical antenna heights and the technical criteria to use in regard to sharing the band between broadcast and non-broadcast services in Region 2. Both matters were referred to the CCIR for further consideration during the intersessional period before the Second Session of the Conference. These subjects were raised for comment in the *Third Notice*.

14. The Commission concluded that it was not necessary to develop recommendations in the *Third Report* regarding these matters. Additional studies performed on the subject by the Radio Advisory Committee and CCIR made it apparent that there is no justification for treating the relationship between the physical and electrical height of antennas in the expanded band any differently from the way this relationship is treated in the existing band, 535-1605 kHz. Moreover, the Canadians, who raised this issue, now regard this matter as being one primarily of academic interest and not one which requires resolution by the Conference. Under these circumstances, there was no need to submit a recommendation for a U.S. proposal on this subject and the Commission did not do so. As to the matter of sharing between broadcast and non-broadcast uses within Region 2, the CCIR has developed sharing criteria, which it will introduce at the Conference. The FCC participated in the work of the CCIR on this issue, and the results reflect U.S. views. Accordingly, there was no need for a U.S. submission on this topic either. Also, the issue of whether TIS (Travelers Information Station) operations should be moved from 1610 kHz to 1700 kHz is primarily domestic in scope and not one to be resolved at the Conference. Thus, the Commission concluded in the *Third Report*, there was no need to provide U.S. proposals on TIS to the Conference.

DOMESTIC IMPLEMENTATION OF BROADCASTING IN THE EXPANDED BAND

15. *Introduction.* The Second Session of the Expanded Band Conference will soon convene. Therefore, it is appropriate to begin an inquiry to consider domestic issues relating to the introduction of AM broadcasting services in this new band. The remainder of the discussion in this *Notice* relates solely to domestic matters. The Commission remains committed to a prompt and effective use of this newly available spectrum. To this end, it is useful to begin developing the record on which to base the domestic implementation of broadcasting in the expanded band. Through the record developed here, the Commission expects to be able to move quickly to formulate specific rule making proposals in line with the results of the Conference. Deferring inquiry on domestic issues until the Second Session is concluded could only delay this process. Furthermore, discussing these issues now will send a clear signal to receiver manufacturers that the Commission intends to move expeditiously on this matter, a step which should encourage the early design and production of new receivers.

16. While the 1979 WARC allocated the 1605-1705 kHz band to the broadcasting service in Region 2, it provided for an interim status of certain services and a continued status for others. Notably, the fixed, mobile, and aeronautical radionavigation services are allocated within the 1605-1705 kHz band on a primary basis, and the radiolocation service on a secondary basis, until the dates of implementation of AM broadcasting are decided by the Expanded Band Conference. After those dates, broadcasting will have an exclusive allocation in Region 2 from

1605-1625 kHz and a primary status from 1625-1705 kHz, the fixed and mobile radio services will be in a permitted category, and the radiolocation service will be on a secondary basis.[13]

17. It should be noted that at the current time our domestic allocation table is significantly different from the international Region 2 table. The band 1605-1615 kHz is allocated to the mobile service thereby accommodating Traveler's Information Stations. The remainder of the band, 1615-1705 kHz, is allocated on a primary basis to the radiolocation service until implementation procedures and schedules are determined by the Expanded Band Conference.[14] The fixed, mobile, and aeronautical allocations already have been deleted from the 1615-1705 kHz band in the 48 continental states.[15] Notwithstanding the changes in our domestic table, there are a number of current users in the private land mobile, maritime mobile and auxiliary broadcasting services operating in the band.[16] Since the United States domestic allocation table already has been revised to reflect future broadcast use of the 1605-1705 kHz band, the only issues are how and when, not whether, these non-broadcast services will be transferred from the expanded band.[17] In other words, we do not contemplate non-broadcast use of expanded band channels.

18. In considering domestic implementation of the expanded band, there are a large number of specific issues that must be anaylzed. However, there is one central issue whose determination will affect many other interrelated issues. The basic question is whether we should use a regulatory scheme that is quite similar to that which applies to the existing AM band, or whether we should adopt a fundamentally different regulatory scheme. As noted above, it also is possible to adopt a new regulatory scheme for some of expanded band channels and to use the more traditional scheme for the remaining expanded band channels.

19. If our traditional regulatory approach were applied to part or all of the expanded band, we would develop a variation of the current system taking into account the technical considerations applicable to this particular frequency band. This would include matters such as the power stations could use and the places where a station could be located. However, adoption of limitations on the choice of power or the level of interference protection involves a series of trade-offs. For example, for a given level of co-channel interference, a single frequency within the continental U.S. could be used for fewer higher power stations or a larger number of lower power stations. Traditionally, the Commission has made this decision, at least in part, but this does not always have to be the case. Even the issue of interference can be treated in a non-traditional manner, with at least co-channel interference protection being decided through operation of the marketplace. As we have discussed in other contexts, there may be public interest advantages in permitting licensees to decide on the level of interference to be accepted. However, we recognize that such an approach raises legal and policy issues which must be addressed.

20. The drawback of the current system is that we can never be certain that the decisions we have made concerning the type of stations we intend to authorize are the ones that best meet the wants and desires of consumers, i.e. the listening public. On existing frequencies on which large numbers of stations already are operating, our actions in authorizing additional stations are constrained by our desire to ensure that those operating stations retain the level of interference protection specified in our rules. However, the expanded AM band presents an opportunity for us to consider allowing new station licensees, rather than the Commission, to determine the appropriate trade-offs on such matters as the number and location of stations and their power level.

21. *The National Licensing Option.* This leads us to consider the possibility of issuing *national* licenses to applicants for operation on a particular frequency in the expanded AM band. We would like to stress, however, that this is not an either-or situation in which we are forced to choose between the traditional approach and a new one involving national licensing. Rather, as already noted, consideration can be given to a combination of these approaches. National licenses might be issued on some or on all of the frequencies available on the expanded band. Under a national licensing approach, if adopted, licensees could be granted a nationwide license to operate on a particular frequency in the expanded AM band. Such a licensee would be subject to the appropriate co-channel and adjacent channel interference restrictions necessary to protect the rights of foreign countries, including Canada, Mexico, Cuba and the Bahamas and would in particular be subject to the maximum power limitation of 10 kW. Also, licensees would be subject to appropriate restrictions on bandwidth of emissions, frequency tolerance and the other technical standards adopted internationally. In addition, a mechanism would need to be developed to facilitate the needed coordination between national licensees on adjacent frequencies so that the licensees could make their plans based on an awareness of the degree of domestic adjacent channel interference to be encountered. Finally, of course, it is necessary to take into account the fact that, under international regulations, no protection is to be offered to skywave signals and that groundwave coverage will be limited because of groundwave propagation characteristics at these frequencies as well as the power limit of 10 kW.

22. Nevertheless, within the bounds of these restrictions, licensees would be free to construct and operate as few or as many AM operations as they wished. For example, licensees might choose to construct a small number of 10 kW operations spaced relatively far apart throughout the country, or a larger number of 250 watt or 1 kW operations located in a larger number of places. Indeed, some licensees might choose to mix some 250 watt, some 1 kW, some 10 kW operations and some other power level operations within their authorized frequency. Moreover, the licensee could decide how close to locate operations to each other, since the licensee, not the Commission, would determine the acceptable level of interference between its own operations conducted on the same frequency. The important fact is that the licensees, not the Commission would determine what they found to be the optimum mix of number of operations and power levels of those operations and interference between its own operations. Licensees would have an economic incentive to choose that combination of operations that generated the largest advertising revenues or operation profits and hence would likely be the combination of operations that provided the most valuable set of services to consumers or listeners. Moreover, since it would be possible to authorize as many as nine separate nationwide licenses, each of those licensees could choose a different mix of the number and power level and location of operations according to what appeared to be appropriate for their particular situation.[18]

23. We are aware that this proposal represents a substantial departure from the regulatory approach that we have used with respect to the existing AM band. However, we believe that there are a number of factors that may support its use. First, we note that there are currently a large number of radio stations licensed in the U.S. Indeed, as of November 30, 1987 there were 4,900 AM radio stations, 4,033 commercial FM stations and 1,297 noncommercial FM stations licensed.[19] While the number of radio stations, especially FM stations, has been growing rapidly in recent years, generally AM stations have not been doing as well as FM stations when comparisons are made based upon station profits, revenues, station sales prices or audience ratings.[20] Hence, it may be desirable to consider a new approach that might well encourage further growth of the AM band, and especially the use of the expanded AM band to provide those services most valued by listeners.

24. In considering which licensing approach to apply, we must also consider Section 307(b) of the Communications Act. It requires that "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." We solicit comment as to whether Section 307(b) requires us to make detailed, individualized determinations with respect to every radio facility we authorize. In this regard, we request comment on the applicability of this statutory provision to the proposed national licensing scheme.

25. In sustaining the Commission's authorization of nonlocal Direct Broadcast Satellite Service (DBS), the court in *National Association of Broadcasting v. FCC*,[21] noted the Commission's responsibility to encourage the larger and more effective use of radio in the public interest and its need to deal with ever evolving circumstances. The court pointed out that the new DBS service would supplement existing broadcast service rather than replace it, thus leading to an enhancement in the services available to the public. Although there are differences in the two cases in how the signals would be delivered, many of the court's observations may be applicable here as well. With over 10,000 AM and FM licenses already distributed throughout the country, the relatively small number of stations which could be authorized on these few expanded band channels may make only a marginal contribution to the traditional goals of Section 307(b). It may be preferable, and appropriate under Section 307(b), therefore, to focus instead on use of this band to offer new and novel services and promote diversity and distribution of radio services in a different way. Thus, it may well be possible to better foster new and innovative services, which enhance diversity for the public, consistent with the overall purpose of Section 307(b). We invite commenters to address this aspect of the proceeding.

26. An additional fact to take into account is that few, if any, of the AM receivers manufactured today are capable of receiving the signals on the full expanded AM band. While we certainly do not contemplate requiring receiver manufacturers to include the expanded band on their receivers, we think prompt and effective use of the band is likely to provide the necessary market incentives for manufacturers to do so. We believe that the concept of nationwide licensing of the expanded AM band may provide a spur to this development, bearing in mind that licenses can be granted more quickly and stations can be built much sooner than if we continued to require separate license applications for each location in which an applicant hoped to construct a station.[22] If we are correct, nationwide licensing could lead to faster authorization of service, and that, in turn, might well lead receiver manufacturers to decide that it was in their self-interest to design and build more rapidly new receivers that were capable of receiving the expanded band signals.

27. Licensees might also find that there are a variety of other advantages from obtaining a national license -- advantages which would redound to the benefit of listeners. There may well be advantages from operating a large group of stations in ways that are similar to those that traditional radio or television networks use. In particular, there may be efficiency advantages in the acquisition and distribution of programs as well as in the purchasing of radio advertisements by national licensees. To the extent that such efficiencies allow a station to operate at lower costs, not only the station but also its listeners are likely to benefit.

28. Although a national licensee might choose to assume full responsibility for establishing all the stations on a channel, it also might prefer to play a coordinating role, allowing others a role in station operation. Such coordination could deal with programming and advertising, perhaps taking the form of "networking". It also could deal with establishing a proper mix of power levels for the stations on the frequency to promote its most efficient use. These arrangements would be covered by contracts between the parties involved. Such contracts, of course, could be requested by the Commission as part of subsequent review. Before such arrangements can be effectuated, however, we first need to consider whether to allow operation by other entities with the operation being coordinated through the national licensee or the Commission. We request comments on all aspects of authorizing national licensing including, but not limited to, the issues raised below. If the "national licensing" approach is adopted, in whole or in part, as the procedure to govern the licensing of the expanded band, criteria will need to be developed for establishing basic qualifications of a national licensee. This may be of particular importance if there are mutually exclusive applications. Thus, we need to address what financial, legal and technical criteria should be utilized for establishing the elegibility of an applicant to be a national licensee. Considering the large undertaking of such a national licensee, special financial criteria may be warranted. As appropriate, this approach also should be examined in connection with the various subject areas explored in the following paragraphs.

29. *Questions* :

A. Should the Commission consider allowing "national licensing" of stations in the expanded band?

B. What are the technical and economic advantages and disadvantages of national licensing?

C. What are the public interest gains and losses in adopting "national licensing" in the expanded band?

D. Section 303 of the Communications Act provides, among other things, that as public convenience, interest or necessity requires, that the Commission shall classify radio stations; prescribe the nature of

the service to be rendered by each class of licensed stations and each station within any class; assign bands of frequencies to the various classes of stations and assign frequencies for each individual station and determine the power which each station shall use; and determine the location of classes of stations or individual stations. How can "national licensing" be structured to best meet the requirements of Section 303?

E. In what ways would the location of stations and the power levels likely be different if national licensing were authorized, rather than the Commission's continuing to mandate particular classes of stations?

F. To what entent would national licensing likely lead to station locations and power levels and interference levels that better match the desires of listeners than would Commission imposed station parameters and separation distances? In view of the different protection requirements which apply depending on whether the particular channel is allotted for use throughout the United States, what provisions would need to be employed to deal with these differences and the need to provide all frequencies with domestic interference protection on adjacent channels?

G. What are the advantages and disadvantages of permitting interference levels to be determined by a national licensee and other parties operating pursuant to some type of coordination agreement? Under what circumstances would an arrangement be beneficial to the parties, nonetheless, be adverse to the best interests of all affected listeners? What is the possibility that contracts, negotiated agreements or actions by the national licensee would result in the practice of excluding less desirable demographic areas from receiving service either by creating pockets of interference or by denying areas a usable signal.

H. Is additional statutory authority necessary to implement the concept of negotiated interference rights? Are contracts for levels of interference consistent with Section 307(b) of the Communications Act? To what extent would the Commission be required under Section 309 of the Communications Act to review and approve the specifics of such interference arrangements? What criteria should the Commission consider in making such an evaluation?

I. To what degree should the Commission be involved in either prescribing contract duration or enforcing breaches in private interference contracts?

J. What technical problems could impede implementation of national licensing in the expanded band?

K. Would national licensing lead to faster authorization of service? Is there a need for special requirements to avoid frivolous filings that could impede this process?

L. Would national licensing lead to faster development of new AM receivers capable of receiving the expanded AM band?

M. Should provision be made for a national licensee to allow others to use the excess capacity on the channel? And if so, what method should be used for this purpose?

N. Would national licensing lead to efficiencies in station location, construction, operation, program acquisition and distribution, advertising sales and networking? If so, what kinds of efficiencies would be created, and how significant would they be?

O. What would be the consequences of national licensing for consumers and stations?

P. Similarly, what would be the consequences for consumers and stations by allowing a national licensee to contract for operation by a third party? Would this be consistent with Section 309 of the Act? What would be the appropriate term for such arrangements?

Q. Would leasing or contracting on a frequency in a particular community by a national licensee be consistent with the prior approval requirements of Section 310(d) of the Communications Act prohibiting an unauthorized transfer of control of a broadcast license? How can Commission procedures ensure that parties operating pursuant to an agreement come within its purview?

R. Who would be eligible to participate in the Commission process of granting a national license? At what stage of the proceedings should this take place and in what form? For example, when would be the appropriate time for local citizens to file petitions to deny? Would this occur at the time the national license is granted, at renewal, or at the time of authorizing individual facilities.

S. If we establish national licenses, should the Commission accept petitions to deny from all listeners living in the United States?

T. What would be the technical and economic impact on existing AM stations if the Commission allowed national licensing of stations in the expanded band?

U. How well do the technical and economic advantages and disadvantages of "national licensing" compare with the "traditional licensing" option?

V. What is the expected effect of national licensing on the overall quality, quantity and value of audio programming delivered to American listeners?

W. Would national or some other new approch to licensing be consistent with Section 307(b) of the Communications Act which requires the Commission to provide a fair, efficient and equitable distribution of licenses and frequencies among the states and communities?

X. Would it be necessary to circumscribe the coordination function of a national licensee to ensure that such activities are consistent with Section 301 of the Communications Act which prohibits ownership of radio channels?

30. As noted, a decision to follow a new regulatory approach could have an important bearing on the view to be taken in regard to the various issues described in the following paragraphs. For that reason, it would be most helpful to the Commission's deliberations if commenting parties took these relationships into account in preparing their comments.

31. Eligibility Criteria. The AM expanded band can be expected to provide many opportunities for new stations to be established and for existing stations to improve their facilities. Unfortunately, the demand for the expanded band is likely to far exceed its capacity. This expectation is based on the Commission's own experience and on the work of the Allocations Subgroup of the Industry Radio Advisory Committee.[23] There has been considerable demand for broadcast facilities in the 1605-1705 kHz band. Much of this demand emanates from such groups composed of and/or representing minorities, women, public broadcasters, and daytime-only licensees seeking full-time operation.[24] Aside from the question of whether to make special provision for one or more of these categories of applicants, beyond our existing comparative licensing preferences, it must be recognized that already identified demand exceeds what can be accommodated by 100 kHz of spectrum. With this in mind, we believe it is important to make the most efficient use of the band.[25] This requires the Commission to carefully evaluate how best to use the expanded band in the public interest, and to that end responses to the following questions are invited.

32. Questions :

A. Should the new spectrum be available on equal terms to all categories of applicants? Should one or more channels be reserved for certain types of applicants?

B. Should the expanded band be used principally or exclusively to provide daytime-only stations the opportunity to operate on a full-time basis.?[26] Should daytime-only stations be allowed to operate on the new band while continuing to operate their existing stations and, if so, for how long? When such a station finally moves to the expanded band, should it be required to surrender its license in the existing band or could it sell that station to another party ready to continue the daytime-only operation?

C. Should the expanded band be used to provide public radio service to areas lacking it?

D. Should the expanded band be used to provide minorities and women with broadcasting opportunities in addition to those which may be derived from the existing comparative licensing preferences currently considered at the application stage.

E. Are there any unserved or minimally served areas in which this band could be used to provide effective service. If so, should application acceptance criteria be established to help effectuate that goal?

F. If there is to be non-technical acceptance criteria for use of the expanded band, should the Commission establish a system of priorities for use of these channels?

G. Conversely, should the Commission refrain from establishing eligibility criteria other than those of a technical nature?

33. Travelers Information Stations. Also related to eligibility criteria is the question of what to do with Travelers Information Stations (TIS). A significant number of them are currently operating on 1610 kHz.[27] Some of these stations are licensed by the Commission. Others, operated by federal agencies such as the Department of Interior, are the responsibility of the National Telecommunication and Information Administration. Under current regulations, all TIS stations operate outside the 535-1605 kHz band. At present, TIS operations are required to protect AM stations on adjacent channels but TIS facilities are not themselves afforded protection from such stations. Thus, while TIS operators must locate where adequate service can be provided, they must do so without causing interference. While this presented little difficulty in the past, it may become a significant problem once broadcast use of the expanded band takes place.

34. The TIS matter received considerable attention by the Allocation Subgroup of the Industry Radio Advisory Committee as well as in various interagency meetings. As mentioned earlier in this proceeding (in both the *Third Notice* and the *Third Report*), it became clear that it was not feasible to maintain TIS operations on 1610 kHz. Without international interference protection from new broadcast stations in the expanded band, TIS operations would not be able to provide effective service on 1610 kHz. Based on the work done to date, the most feasible approach appears to involve the use of 1700 kHz for TIS.

35. Questions :

A. What technical standards should apply to TIS operations?

B. Is there any reason why TIS should not be moved to 1700 kHz?

C. If TIS stations are required to move to 1700 kHz, when should that occur?

D. What protection should TIS stations be afforded from adjacent channel broadcast operations? What protection should TIS stations provide to adjacent channel broadcast stations?

E. Although TIS stations have not had defined service areas in the past, they must have some service area to be protected in the future. Should TIS stations have a service area based on a particular signal level, or other criteria such as a given radius about the antenna or areas defined separately for each TIS station based on the areas intended to be served?

F. Although TIS stations have not been notified either to foreign countries or to the IFRB because they were not in the broadcast band, should TIS stations now be notified in order to receive protection from foreign stations? Would such an action cause some foreign countries to start notifying some of their low powered AM stations, not previously notified, which could have preclusive effects on prospective U.S. operations?

TECHNICAL CRITERIA FOR AM BROADCAST STATIONS ON THE EXPANDED BAND

36. Introduction. If the Commission were to adopt the national licensing plan on all of the expanded band channels, there would be no need to adopt many of the technical rules necessary if a traditional licensing approach is adopted. Provisions concerning such matters as domestic co-channel interference, caused or received, would not be required. However, if any or all expanded band channels are licensed in the traditional mode, technical rules providing for station classes, protected contours and concerning other like matters will be necessary. Since at least

some of the technical standards are applicable in any event, these technical standards will be presented for discussion next.

37. As stated previously, in regard to technical standards the Commission has proposed to treat the expanded band as an extention of the existing AM band rather than as a separate part of the spectrum. We believe that this would foster the early development of transmitters and receivers for the expanded band and therefore aid its prompt and effective use. Many of the fundamental parameters are those adopted at the First Session and which are expected to be incorporated in the Technical Annex to the Agreement to be adopted at the Second Session. Under these circumstances, we do not believe that it is desirable or practical to vary them domestically. However, certain parameters can be varied domestically, providing that there is no conflict with international requirements, and we will raise them now for discussion.[28]

38. Class of Station. Under current regulations, the designation of the class of AM station determines most major aspects of station assignment and operation. These include the maximum and minimum allowable powers and the type of protection from interference that the station would receive. Therefore, it is important to discuss what class(es) of station would be appropriate in the expanded band and the degree of discretion to afford licensees in this regard. In order to put the matter in perspective, however, we will first briefly discuss the current classification scheme.

39. The present system for classification of AM broadcast stations within the United States was developed in conformity with international agreements of an earlier vintage. The Commission's rules classify channels as Clear, Regional or Local channels, and prescribe the classes of stations that may be assigned on each class of channel. U.S. stations are generally classed as Class I, II, III, or IV, with certain sub-classifications.[29] Class I-A and I-B stations operate on clear channels, providing service to large groundwave and (at night) even larger skywave coverage areas. Class II stations are the secondary operations that share the clear channels with the dominant Class I stations. Because of the 10 kW power limit as well as the absence of skywave coverage and the limitations on groundwave signal propagation on these frequencies, a clear channel approach is not feasible on the expanded band. On the other hand, an approach patterned after the Class III operations on the regional channels or the Class IV operations on the local channels (or a combination of the two) are feasible. Class III stations operate with a power from 250 watts to 5 kW and serve intermediate sized areas.[30] Class IV stations operate on local channels on a full-time basis with a maximum power of 1 kW. Because of their modest power and limited interference protection, Class IV stations serve a more modest area in the vicinity of the community of license. It would be possible to permit either type of station or a combination of them to be established in the new expanded band. This choice could be made by the Commission or, as discussed above, left to licensee discretion.

40. Questions :

A. Should there be only one class of station in the expanded band, and, if so, should it be Class III or Class IV?

B. Should a new Class V station, with a minimum power of 250 watts and a maximum power of 10 kilowatts, be established only for use in the expanded band? Should such a station be protected to its 0.5 mV/m daytime contour, while at night being protected to its 10 mV/m groundwave contour?[31]

C. What, if any, other class(es) of station should be created for use in the expanded band?

D. If different classes of station are permitted on different frequencies in the expanded band, how should such a plan be effectuated?

41. Minimum and Maximum Power. The reason for a minimum power is to ensure that the detriment caused by adding a new station is outweighed by the benefit of the new station. Generally speaking, the detriments of adding a new station are the preclusion of other, possibly more beneficial uses of the frequency and the raising of the overall level of interference on the channel. Certain situations would not be feasible, such as new one-watt stations that could not provide usable service to listeners but could preclude more powerful stations. Also, it would not be desirable to create an interference situation in which there are only isolated areas of service surrounded by vast areas of interference. To ensure that we do achieve sufficient benefit, the Commission now requires that stations utilize a minimum power of 250 watts, or, alternatively, a minimum efficiency of 141 mV/m at one kilometer.[32] In regard to maximum power, the Expanded Band Agreement will contain an absolute maximum power of 10 kW. It also will establish criteria that will restrict the impact of U.S. facilities on foreign allotment areas and stations to that which would be achieved by a one-kilowatt non-directional operation. These points will need to be borne in mind regardless of whether the Commission decides on the power to use or whether the licensee will be given the opportunity to make this choice.

42. Questions :

A. In view of the poorer groundwave propagation at the higher frequencies of the expanded band, should there be a minimum power of 250 watts; or alternatively should a limit higher than 250 watts be established?

B. Should the same power requirements apply to all channels? If not, what other system should be used?

C. In developing our maximum power criteria, should we allow the full power permissible internationally (i.e., 10 kilowatts)?

D. Should we provide for a more limited maximum power? If so, what should that power be? Should that maximum allowable power vary depending on frequency?

43. Protected Contours. With the exception of Class I stations, all stations in the existing 535-1605 kHz band receive daytime protection to their 0.5 mV/m contours.[33] During nighttime operation, different classes of stations receive protection to groundwave and/or skywave contours that vary with the class. Also, new stations accept the existing interference which they receive when they begin operation. This acceptance may define their protected contours at night, because, frequently, existing skywave interference precludes being able to provide service to what

would otherwise be the normally protected contour. The nighttime groundwave contours which are protected (subject to existing interference) range from the 2.5 mV/m contour for Class II-B and Class III stations to 10 mV/m for Class II-C stations to no protection for Class II-S and Class IV stations. Each of these levels of protection is the result of balancing the number of stations which can operate on a frequency against the interference levels which result. For if more stations operate on a frequency, then, in general, each must accept more interference. Our different treatment of the interference protection for the several classes of stations has offered a certain amount of flexibility in enabling licensees to respond to specific market conditions. Obviously, this flexibility has been less than would be possible under a "national licensing" scheme. The question becomes one of determining whether it is possible and desirable to go beyond the traditional approach and thereby to maximize licensee choice? In answering this question, due account must be taken of the provisions of the Expanded Band Agreement.

44. In implementing the expanded band, we must, once again, balance the number of stations against the interference levels which will result. To provide a benchmark, we look at the criteria used in arriving at the allotment areas in the Expanded Band Agreement. Here, for Noise Zone I (which includes all U.S. territory), a minimum distance between allotment areas of 330 kilometers was adopted. This is based on skywave protection for a nighttime protected groundwave contour of 3.3 mV/m, using the skywave propagation curve in the Agreement.[34] Thus, any U.S. station in the expanded band which is sufficiently close to a foreign country could receive interference sufficiently high to limit its nighttime service to its 3.3 mV/m groundwave contour.[35] However, this can only occur when the U.S. stations are within 330 kilometers of a foreign country. As this distance increases, they become subject to less and less interference from foreign stations.

45. Questions :

A. Is it reasonable to require a U.S. applicant to provide more protection to an existing U.S. station than to its 3.3 mV/m contour (as is provided by a foreign station)?

B. In providing for the protected nighttime contour, should we divide the U.S. into zones with varying protected contours in the different zones?[36]

C. If we adopt the approach described in Question B, how should the zones be described? What nighttime protection should be provided in the different zones? Would it be necessary to develop one set of zones corresponding to U.S. allotment areas, with a different set of zones corresponding to non-alloted areas in the U.S.? Should we develop additional zones with different protection levels, based on other criteria, such as population density, for example, as we have for FM and TV?

D. Is it possible to develop a system of protection requirements that is responsive to market incentives and thus highly flexible while at the same time observing applicable international requirements? How might such a system work?

46. Groundwave Propagation. We plan to continue to use the same techniques for calculating groundwave propagation in the expanded band as in the existing band. These techniques include the use of measurement data to establish conductivities (where appropriate), obtaining conductivities from FCC Figure M3 in the absence of measurement data, and the use of the equivalent distance method when changes in conductivities are involved. While these general techniques will remain unchanged, it is necessary to develop and incorporate into the rules a set of propagation curves of groundwave field strength versus distance for the expanded band in the same way as has been done for the various frequencies in the existing AM band. Currently, Graphs 19 and 19-A in Section 73.184 of the Commission's rules cover 1520 kHz to 1610 kHz; they were actually computed for 1565 kHz. Graphs 20 and 20-A must be developed to cover the frequencies through 1700 kHz. The field strength versus distance curves adopted at the First Session cover the range 1605 through 1705 kHz; they were computed for 1655 kHz, thereby overlapping our existing Graphs 19 and 19-A.

47. Question :

Should Graphs 19 and 19-A be amended to limit their use to an upper frequency of 1600 kHz, with new Graphs 20 and 20-A being developed to cover 1610 through 1700 kHz, or should Graphs 19 and 19-A remain unchanged, with new Graphs 20 and 20-A being developed to cover 1620 through 1700 kHz?

48. Skywave Propagation. In the existing 535-1605 kHz band, we generally use one of two different skywave propagation curves, depending on the class of station. Figure 1a in Section 73.190 is used on the clear channels, while Figure 2 in Section 73.190 is used on the regional channels. (We also use Figure 1b when Alaskan stations are involved.) A curve corresponding to Figure 1a was adopted by the First Session for international use in the expanded band. To conform more closely with the expected regional agreement, we are inclined to adopt the use of Figure 1a throughout the expanded band, except for the use of Figure 1b when Alaskan stations are involved. However, this decision should, perhaps, correspond to the class(es) of stations to be assigned in the expanded band. Thus, for example, if we conclude that it would be appropriate to assign Class III (regional) stations in the expanded band, that may dictate the use of Figure 2 rather than Figure 1a. Figure 1a is a function only of distance while Figure 2 is a function of both distance and geographic latitude. And if we decide to assign Class IV stations, it would be unnecessary to reach a decision concerning skywave propagation since Class IV stations receive no nighttime protection from skywave interfering signals. On the other hand, providing for a new class in the expanded band (or leaving this to licensee discretion) would provide greater latitude in choosing the appropriate skywave propagation curve.[37]

49. Should we decide that it is appropriate to use Figure 2 rather than Figure 1a on one or more of the expanded band frequencies, we may also wish to reconsider the value of the nighttime protected contour. As noted above, a curve equivalent to FCC Figure 1a was used to arrive at a protected nighttime contour of 3.3 mV/m for international purposes. However, use of Figure 2 rather than Figure 1a in these circumstances would correspond to a

protected contour of 3.0 mV/m with a midpoint latitude of 35 degrees or 2.5 mV/m with a midpoint latitude of 50 degrees.[38]

50. Questions :

A. Which skywave propagation curve(s) should be used in the expanded band?

B. Should the domestic nighttime protected contour correspond to a domestic nighttime skywave propagation curve different from the international nighttime skywave propagation curve? If so, to what should it correspond?

51. Coverage. Section 73.24(j) of the Commission's Rules provides that the entire city of license must be encompassed by the station's 5 mV/m contour during the day, and by its 5 mV/m contour or its nighttime limitation contour (whichever is greater) at night. Because the groundwave propagation characteristics at the higher frequencies in the expanded band are not as advantageous as at lower frequencies, it will be more difficult for a station to provide a 5 mV/m signal over the community, especially in those areas of lower conductivity where the power will be limited to one kilowatt. For example, even assuming a 10 kilowatt non-directional station with an efficiency of 950 mV/m at 1 kilometer located in an area of uniform conductivity, we find the following distances from the antenna site to the 5 mV/m contour:

Conductivity	Distance	Distance
(mS/m)	*(km)*	*(miles)*
1	10.6	6.6
2	13.0	8.1
4	17.8	11.1
8	26.2	16.3
15	37.8	23.5
30	55.5	34.5

Of course, if the station were operating at less than 10 kilowatts, the distances would be even shorter. And with a directional antenna, the distances would vary with direction. Beyond these technical considerations, if we are to adopt a form of "national licensing", it would be unnecessary to adopt a city coverage requirement that would lessen licensee discretion considerably.

52. Questions :

A. Should stations in the expanded band be required to meet a city coverage requirement? If yes, what form of requirement should be applied?

B. If city coverage requirements are to be used should they apply both day and night or only during daytime hours when lesser levels of interference may be experienced?

C. Are special provisions required if we relocate some daytime-only station operations to the expanded band?

D. What effect does the operation of numerous AM stations have on our traditional interpretation of Section 307(b) requiring city grade coverage of the city of license.[39]

53. Daytime Skywave. It is well established that there is a small amount of skywave propagation during the daytime hours. The propagation is greater during the transition hours from nighttime to daytime and from daytime to nighttime (and greater still during nighttime hours themselves). Section 73.187 of our Rules provides for limitations on radiation towards the 0.1 mV/m groundwave contour of co-channel Class I stations during the two hours after sunrise and the two hours before sunset. The impact of daytime skywave at the 0.5 mV/m groundwave contour is significantly less than at the 0.1 mV/m groundwave contour. Therefore, stations other than Class I stations do not receive protection from daytime skywave because they are protected to their 0.5 mV/m contours. Although it is likely that the daytime operations in the expanded band will be protected to their 0.5 mV/m contours (rather than their 0.1 mV/m contours), we note that the efficiency of the daytime skywave propagation increases with frequency. Therefore, we question whether the effect of daytime skywave interference at the 0.5 mV/m daytime contour of a station in the expanded band would be comparable with the effect of daytime skywave interference at the 0.1 mV/m contour in the existing band.

54. Question :

Should we adopt daytime skywave protection criteria and, if so, in what form? If "national licensing" were used on some or all of the expanded band channels, would there be any need for daytime skywave protection on the national channels?

55. Different Technical Criteria for Certain Situations. In concluding this section on what technical criteria are to apply to AM broadcast stations on the expanded band, we should reflect on whether reduced technical requirements are warranted in certain situations. For example, Section 73.37(b) of our current Rules provides that an application can receive what would otherwise be prohibited overlap within its 0.5 mV/m contour in certain circumstances where the station would provide service to areas with limited existing service. Less restrictive technical requirements could assist the early initiation of service in the expanded band as well as serve other needs of the public. Also, perhaps, waivers of certain standards for certain periods of time would be appropriate. These are option which should be considered.

56. Questions :

A. Should Section 73.37(b) of the Commission's Rules be applied in the expanded band?

B. Are there any technical requirements, including those relating to interference, which are currently imposed on AM broadcasters but should not be applied to stations in the expanded band?

PROCEDURES TO IMPLEMENT USE OF THE EXPANDED BAND

57. Introduction. When the expanded band becomes available for broadcast use it can be treated as new spectrum. We wish to adopt processing procedures which will ensure that it is used effectively and efficiently. Subsidiary concerns include treating applicants fairly and ensuring

that Commission resources are not overwhelmed by an avalanche of applications. We have every expectation that these goals can be fulfilled.

58. Allotment versus Assignment. Internationally, the U.S. supported the allotment approach to the expanded band usage rather than the assignment method. Region 2 countries agreed, and at the First Session of the Expanded Band Conference, the allotment planning method was adopted. As previously noted, under an assignment plan, an assignment for each station is entered into the plan with a specific location, power and other pertinent characteristics, whereas an allotment plan makes designated frequencies available for use anywhere within a specified area. At this stage in the proceeding, it is appropriate to inquire into whether an allotment system or assignment system should govern the domestic implementation of the expanded band, assuming that national licensing is not adopted on at least some channels.

59. This is not the first time the allotment issue has been considered. This approach was found suitable for Class II-A AM stations[40] because the Class II-A allotments were made on channels that, unlike the rest of the existing AM band, at that time, were vacant at night (except for a single Class I-A station on each channel). In 1963, however, when considering the allotment approach for AM in general, the Commission concluded that such a method was unsuitable because there were already many stations operating on the band that might be affected by use of the allotment approach and there are too many characteristics which varied too widely in their individual circumstances.[41] These include varying conductivities, varying propagation characteristics and varying directional antenna patterns. Unlike the AM band in general, which even in 1963 contained large numbers of existing stations, the expanded band does not contain any existing broadcast stations. Thus, an allotment approach would be more easily implemented in our situation.

60. In considering the trade-offs between allotments and assignments, we must remember that many of the domestic considerations are different from the international considerations. For example, internationally, the allotment areas may be quite large, so it may be possible that several assignments could be implemented in a single allotment area. On the other hand, a domestic allotment plan would most likely provide for only one assignment per allotment area, albeit with a wide choice of antenna locations. There are benefits from using the allotment approach, and there are benefits from using the assignment approach. There are also detriments to use of either approach. In this proceeding, we must balance the benefits against the detriments to determine which approach is more appropriate for the expanded band.

61. The primary benefit of the allotment approach is organized planning for the future. With assignments, the spectrum could be filled up quickly on a first-come, first-serve basis, meeting short-term needs, but with little or no regard for long-term requirements. In the existing AM band, some station owners assert that their communities have grown around their stations to such an extent that they can no longer serve the entire community. Yet a power increase (or other change) is precluded because the AM stations in the existing band have been "shoe-horned" in. Allotments could reduce this possibility somewhat by, for example, reserving space for future power increases as communities develop and thus would be able to support higher- power stations. This is of particular concern in the expanded band where, owing to a lack of existing receivers, new stations may be expected to operate initially with limited facilities, but with increases desirable as the number of receivers increases.

62. The allotment approach also allows consideration of the spectrum as a whole, rather than looking at it on a case-by-case basis. What may appear to be efficient and desirable in an individual case, or in a series of individual cases, may turn out to have an adverse impact on overall spectrum use. For example, a new station may appear to be desirable when only that situation is examined. But in a broader context, that application for a new station now may preclude future applications for several new stations. The allotment approach considers the forest while the assignment approach looks at the individual trees. The allotment approach might also be a worthwhile alternative to national licensing. Allotments could be made for a large area, such as a region, rather than for individual communities, thereby permitting more than one station to be established in an allotment area. This could provide some of the same efficiencies of service and other positive traits of national licensing while being more limited in its reach.

63. Desirable as the allotment approach may seem at first impression, there are also significant problems with its implementation. First, there must be some workable method of predicting future needs. This is not an easy task, as it is difficult to predict the future, and there are many conflicting needs. We did something similar, on a limited basis, in our preparations for the Second Session of the AM Conference in 1981, and again in our preparations for what became the 1984 U.S.-Canadian AM Agreement, when we asked for "expressions of interest" that we could take into account in our international endeavors. At this time, we have over 100 "expressions" unfulfilled, even though these were statements by specific individuals or existing stations about specific frequencies and locations in the existing AM band where lack of receivers is not a concern. We can expect that there would be even greater difficulties in attempting to achieve a reasonable set of needs in the expanded band.

64. Another concern about the allotment approach for AM broadcast is that there are so many variables that it makes allotments difficult to work with. For example, there is different propagation during the daytime and nighttime. Should we develop allotments with higher daytime powers to compensate for this? Also, there are extensive variations in ground conductivity and directional antenna patterns. What might be deemed unacceptable for an allotment based on assumed values of conductivity and a simple directional pattern might fit easily with the actual conductivities and/or a slightly more complex directional pattern.

65. Many of the benefits of the assignment approach resolve the deficiencies of the allotment approach. When the actual antenna site, conductivities, and directional antenna pattern can be adjusted precisely in an individual case, it is often possible to squeeze in a station where the allotment approach would preclude it. On the other hand, it is the "shoe- horning" in of stations that has, in some cases, prevented their future development, and the ability to add stations to meet future needs.

66. In addition to the above comparison between the two planning methods in general terms, it is important to consider the implications of the possibility of "national licensing" and whether it is consistent with one or both of these planning methods. It may be necessary to impose

certain technical limitations on a national licensee in order to provide the requisite international protection. Since this is a new concept, we seek all possible suggestions on how such an approach might be effectively implemented.

67. Finally, a question about the negotiation of interference rights, raised in the recently released *Notice of Inquiry* initiating a review of AM technical assignment criteria, also is relevant here.[42] As we observed, there are advantages in permitting parties to negotiate the resolution of interference issues. The current system, which relies on a uniformly applied set of protection criteria, could well be producing inefficiencies which are adversely affecting listeners. Furthermore, where there are opportunities for *new* AM stations, and these are limited, the current interference standards place severe additional restrictions on commencement of such service. The current approach may well limit service to areas with newly developed population centers. Likewise, the rigid application of interference limitations may prevent opportunities for expanded band licensees to obtain greater interference protection so as to more effectively compete with other stations and it can necessitate unnecessary levels of protection against interference in areas not actually being served. As it would be impossible, as well as inappropriate to attempt to administratively remedy such interference situations, we wish to examine the relative advantages of allowing the matter of interference protection to be resolved through private agreements between affected broadcasters.

68. Questions :

A. Should the Commission adopt an allotment approach for domestic implementation of the expanded band?

B. If an allotment approach is adopted, what criteria should be used in determining which allotments are provided in which locations and frequencies? Should we adopt an allotment approach specially tailored to "national licensing"? Should we develop a geographic grid that evenly spaces allotments across the country? Or should we request a list of needs designed to meet our goals, and propose for comment specific allotments as we did for our recent amendments to the FM Table of Allotments?[43] Is there a feasible way to make provision for negotiation of interference rights in these regards?

C. Would we have an AM Table of Allotments similar to Section 73.202 for FM and Section 73.606 for TV? Or would it be more similar to Section 73.22(a) for AM Class II-A stations?

D. What procedures would be involved in making changes in the allotments after adoption of the initial table? Would Rule Making be required for each change, as in FM and TV?

E. Once an assignment implements an allotment, would the entire allotment area continue to receive protection from interference (as anticipated in our international agreement on the expanded band), or would only the assignment receive protection (as in FM and TV)?

F. After working with allotments for several years, should we switch to a purely assignment process as the expanded band becomes filled?

69. Applications for Expanded Band Licenses. Regardless of whether the Commission resolves to use an allotment or assignment method of implementing the expanded band, those wishing to operate expanded band stations will be required to file an application. This will be the same whether a traditional approach is used or whether there is "national licensing" and the grant of a license for all uses of a given frequency. In any case, there will be an initial batch of applications when the expanded band is first opened for broadcast use and later there will be subsequent applications for this segment of the spectrum. An application procedure which balances the competing objectives of our processing system to both expedite service and provide opportunities for the filing of multiple applications is needed.

70. We tentatively believe that a processing system consisting first of a one-time filing period, to be followed by a "first come, first served" procedure would meet the objectives of essential fairness and reduce any potential processing delays. It has been used in the FM broadcasting and Low Power TV services and has proved to be a fair and efficient processing method.[44] Under the proposed approach, the Commission would announce a one- time, fixed filing period or "window" which would govern all applications for the channels in the expanded band. All mutually exclusive applications filed during the window could be made subject to comparative hearings to determine the best applicant.[45] If only a single acceptable application is filed during the window, then that application would be grantable if the usual qualification criteria are met. In the event a window closes and no acceptable applications have been filed during the window period, a "first come/first serve" processing standard would then apply whereby the first acceptable application received would cut off the filing rights of any subsequent applicants. License applications for frequencies added to the Table of Allotments (formerly the Table of Assignments) by future Commission orders would be subject to similar filing windows, as announced in an appropriate order.

71. Recently the Commission modified the application filing window procedure used in the Low Power Television and Television Translator Service to limit the number of applications submitted during any one window.[46] This limit or "cap" consists of five applications per window by the same applicant or by any entity having an interest of one percent or more in any applicant(s) filing in one window. This action was taken to provide for the orderly development and stability of the service. Depending on whether or not the Commission limits the number of expanded band stations to which any one party may be licensed (and the nature of any such limit), such a cap may be advisable in the expanded band, too. Not to do so could prove detrimental to the establishment of new AM service. Without such a limit, there may well be over-filing of applications and processing backlogs. Thus, to avoid administrative delay in processing expanded band applications, we believe it advisable to explore the imposition of a cap on applications in this newly available broadcast spectrum. In addition, we wish to consider whether it would be possible to adopt, in lieu of a cap, a "geographic" approach to this matter in which windows would be opened only in particular states or regions. This is more difficult in a service like AM where skywave interference effects can be widespread. Also, in contemplating this option, we will explore whether it might actually work against the expeditious institution of new

service because a significant number of areas, as in the low power situation, could not be filed for until much later that any initial window.

72. Questions :

A. Should the Commission adopt a "window filing-first come/first serve" processing system for the expanded band spectrum? How might this be tailored to "national licensing"?

B. In view of the lack of available receivers, if the proposed processing system is adopted, should the "window" period be a long one? How long?

C. Should there only be one "window" or should there be several?

D. Should we make everything available during the "window" period, or proceed in a more limited fashion?

E. If we opt for allotments, should we open up allotment areas in several steps rather than simultaneously, and, if so, how can this be accomplished fairly yet efficiently?

F. Once there are numerous authorized stations in the expanded band, should the application procedure become the same as our procedures * for the 535-1605 kHz band and, if so, at what stage of development?[47]

G. Because of adjacent channel interference concerns, how would applicants for facilities on 1600 kHz, 1590 kHz, and 1580 kHz be considered with respect to the "window"?

H. If the Commission adopts the allotment method, should the decision to adopt traditional application procedures at a certain stage of development of the expanded band be linked to a decision to abandon the allotment approach for a purely assignment process?

I. Depending on whether or not the Commission limits the number of expanded band stations to which any one party may be licensed, and to what degree, should the Commission impose a "cap" on the number of applications per window by the same applicant or by any entity having an interest of one percent or more in any applicant filing in one window?

J. Is a "geographic" approach in which windows would be opened only in particular states or regions feasible and if so, would it represent a better option than a "cap" to limit the number of applications for licenses in the expanded band?

73. Mutually Exclusive Applications. The Communications Act of 1934, as amended, authorizes the Commission to grant broadcast licenses only if the public interest, convenience and necessity would be served.[48] As a matter of procedure, the Commission is directed to grant a full hearing if a substantial or material question of fact arises or if the Commission is otherwise unable to make the substantive public interest finding necessary to grant a license application.[49] Although a full hearing is not a statutory prerequisite to the grant of a license, it has been required in order to deny a license application in the AM, FM and TV broadcast services. Since in mutually exclusive application situations one or more applications must be denied, comparative hearings traditionally have been held in AM, FM and TV application cases.

74. Furthermore, Section 307(b) of the Communications Act requires that, in considering applications for broadcast licenses, modifications, or renewals, the Commission must provide a fair, efficient, and equitable distribution of licenses and frequencies among the states and communities. In mutually exclusive application situations where different communities of license are involved, a comparative hearing is held to determine: (1) which proposed community of license has a greater need for the broadcast outlet and (2) which applicant is the most qualified under our comparative licensing criteria.[50] In order to determine which community has the greater need, a detailed examination is made as to the need of each applicant's proposed service area -- including its community of license -- for additional reception and transmission services. This involves considering the number of local outlets presently transmitting from the respective communities and the number of total broadcast signals that are received in those communities. Considerable weight is given to proposals resulting in a first or second local service. Once it has been determined which mutually exclusive proposal would result in the most effective use of that frequency, a 307(b) preference is given to the applicant proposing that community. This preference can be dispositive of a comparative hearing.

75. In view of the many AM stations (4,867) already operating, we question whether we should apply this traditional approach to Section 307(b) to the licensing of stations in the expanded band. In other words, in the licensing of additional AM facilities should the Commission undertake a detailed examination of the needs of different communities when they already have numerous reception services? Should Section 307(b) be applied in a different way considering today's marketplace with its abundance of services? For example, we might consider regions of the country rather than individual communities with regard to licensing on the expanded AM band.

76. Selecting among mutually exclusive applicants for new broadcast stations has posed a continuing problem for the Commission. Comparative hearings, in which applicants are evaluated by numerous and complicated criteria, are lengthy and expensive.[51] Not only does this result in the delay of new broadcast service, but it may not necessarily result in an award of a license to the applicant who will best serve the public interest. In our immediate situation, where 100 kHz spectrum is being made available for broadcast use by the public, the potential for delay in service due to mutually exclusive comparative hearings is significant. As previously noted, the Commission is committed to prompt and effective use of this newly available spectrum. Consequently, the question arises as to whether some procedure other than oral comparative hearings can be utilized for selecting licensees for stations in the expanded band.

77. In recent years, the Commission has concluded in numerous Rule Making proceedings that it has the authority to use more expeditious selection procedures for mutually exclusive applicants. Noting that the traditional full comparative hearing process had proven to be a costly method, the Commission proposed, among other selection methods, a paper hearing process for selecting among competing mutually exclusive MDS applicants.[52] Also, although currently cellular applicants are chosen by lottery,

a streamlined paper hearing was initially used to select among competing cellular applicants and was upheld by the Court of Appeals.[53] Of course, there is the possibility of using a lottery to select expanded band licensees. Pursuant to Section 309(i) of the Communications Act, we have employed lotteries to award licenses for low power television, cellular radio and MDS and SMRS with great success. For instance, in the low power television service, the lottery has significantly expedited the time required to process the enormous number of applications filed for that service. Perhaps, therefore, it can help in the expanded band to expedite service at lower cost to the applicant and the Commission.[54]

78. Questions :

A. Should the Commission retain the traditional oral comparative hearing in selecting among mutually exclusive applicants for new licenses in the expanded band and, if so, should specific categories of applicants receive a preference in their comparative evaluation?[55]

B. In view of the diversity and dispersion of the thousands of AM stations already operating in the 535-1605 kHz band, should we apply Section 307(b) of the Communications Act to the expanded band in the way we have traditionally applied it in the licensing of AM stations?

C. Should the Commission consider alternatives to an oral hearing such as a paper hearing or a lottery procedure?

D. If the "window filing-first come/first serve procedure were adopted, would an alternative approach to selecting licensees be necessary?

E. Should the use of the traditional hearing versus an alternative approach depend on the number of mutually exclusive applications, or how they are dispersed geographically?

F. Since an allotment approach could minimize chains of linked applications extending across the country, should our concerns regarding the efficient resolution of mutually exclusive applications have an impact on our selection of an allotment or assignment approach?

79. New Approaches to Ownership Limitations. The goal of the Commission is a more dynamic and robust AM service fully responsive to the needs of the listening public. Yet, as noted in April 3, 1986, *Report on the Status of the AM Broadcast Rules*, prepared by the staff of the Mass Media Bureau, the state of AM broadcasting today is problematic.[56] In terms of revenues/profits, audience/ratings and station sale prices, AM broadcasting has declined, while its FM aural broadcasting counterpart has grown. We need to keep the current state of AM broadcasting in mind when developing the various aspects of the regulatory scheme for the expanded band. This is particularly important in the area of multiple ownership. Rather than impose the same regulatory constraints that have restricted broadcasters in the 535-1605 kHz band, we recognize the possibility that rules such as our "duopoly" and other multiple ownership regulations could adversely inhibit the establishment of stations in the expanded AM band and thereby limit service to the public.

80. In the past, the Commission promulgated rules prohibiting the grant of a license to any individual or entity if the acquisition of the license would result in what the Commission considered to be an undue concentration of control at the national level. Over the years the Commission established various limits on the number of AM, FM or television stations that could be owned by any one party. The most recent amendment of these national ownership rules in 1984[57] relaxed the rules to the extent that Section 73.3555(d)(1) of the Commission's rules now provides, among other things, that an entity may own no more than 12 AM stations. However, an entity may own as many as 14 AM stations if no more than 12 stations are controlled by persons other than members of minority groups.

81. In addition, a separate provision of the Commission's rules prohibits any entity from owning more than one AM station within the same community or whose pertinent contour overlaps another commonly owned AM station owned by the same entity. However, on February 20, 1987, the Commission released a *Notice of Proposed Rule Making*, which, among other things, includes proposals to modify that provision.[58] This "duopoly" proceeding has not yet been resolved. Neverthless, we believe it would be appropriate to consider either not applying those rules to the expanded AM band or alternatively proposing a five year (or longer) exemption from the application of the ownership rules to the expanded band.

82. Indeed, if the Commission were to adopt the proposal for nationwide licensing within all or part of the expanded AM band, it seems clear that it would not be appropriate to apply the 12 station limit or the "duopoly" rule to such national licensees. Only by allowing these licensees the freedom to locate as many or as few stations as they wished anywhere throughout the U.S. would they truly have the ability to decide for themselves what appeared to be the most efficient distribution of those stations. Hence, in order for licensees to use their national license in the most efficient and most effective manner to provide desired services to listeners, it would be essential for us to avoid imposing any ownership restrictions on them, at least with respect to facilities in the expanded band.

83. Even if we decide not to adopt a national licensing scheme on some or on any of the expanded band channels, we believe it would still be appropriate to consider a temporary waiver of the "duopoly" and national ownership rules for some period of time, such as five years, with respect to AM stations operating in the expanded band. At least until a substantial fraction of listeners own radio receivers that can receive those frequencies, it may be difficult to establish viable stations on this band. Because we wish to encourage entry into that band, we believe it may be desirable to place as few limitions on entry into that band as possible.

84. We believe there are several reasons why it might be unnecessary and indeed counterproductive to maintain national station limits and "duopoly" limits in the expanded band, at least for an initial period of time (perhaps 5 years), and possibly permanently. First, large numbers of AM and FM stations operate throughout the country, providing service to nearly all areas of the country. Thus, the possibility that even a nationally licensed entity could exert any significant amount of market power in any local radio market or even throughout the country, seems remote. If we choose to issue individual licenses rather than

national licenses within all or part of the expanded band, then there seems to be even less reason to be concerned. Also, it is important to note, that because of interference considerations, a single entity could not operate two separately programmed stations on the same frequency in the same market. At most, it could operate them in tandem, (with the same programming) on a synchronized basis. With all these points in mind, it seems unlikely that even a national licensee would be able to acquire sufficient power in the market to be a cause for concern.

85. In fact, there may be advantages in avoiding ownership restrictions, such as networking type efficiencies from owning more than 12 stations. This could encourage rapid development of the expanded band, regardless of whether or not we authorize national licensing. In addition, there may well be substantial efficiencies from operating two or more AM stations within the same market to provide better coverage. Again this would be true regardless of whether or not we allow national licensing. Hence, we request comment on the desirability of exempting the expanded band from application of multiple ownership rules, either permanently or for a period such as five years.

86. Questions :

A. Whether or not the Commission authorizes national licensing, would it be desirable not to apply the national ownership rules to the expanded band?

B. Alternatively, would it be desirable for the Commission to grant a five year (or longer) waiver of the national ownership rules to any entity licensed in the expanded band?

C. How would the Commission provide for orderly divestiture after the waiver terminates?

D. Whether or not the Commission authorizes national licensing, would it be desirable to avoid applying the "duopoly" rules to the expanded band?

E. Alternatively, would it be desirable for the Commission to grant a five year (or longer) waiver of the national "duopoly" rules to any entity licensed in the expanded band?

CONCLUSION

87. We expect this inquiry to aid the Commission in introducing AM broadcasting services in the expanded band in an efficient and effective manner once the Expanded Band Conference is completed. The prompt beginning of service in this newly available spectrum would be of significant benefit to the public. The record developed in response to this *Notice* should help the Commission to achieve that goal. Therefore, we invite commenters to address the issues we have identified as well as any other pertinent matters they wish to bring to our attention in this regard.

PROCEDURAL MATTERS

88. Pursuant to the authority contained in Sections 4(i), 303(r), 307(b) and 403 of the Communications Act of 1934, as amended, IT IS ORDERED that this *Fourth Notice of Inquiry* IS ADOPTED.

89. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before and reply comments on or before . All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Rm. 239) of the Federal Communications Commission.

90. For further information regarding this proceeding please contact either Ms Freda Lippert Thyden of the Mass Media Bureau at (202) 254-3394 or Mr. John Boursy of the Mass Media Bureau at (202) 634-6315.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] For simplicity, we shall refer to this Regional Administrative Radio Conference (RARC) as the Expanded Band Conference. Pursuant to Resolution No. 1 of the Plenipotentiary Conference of the International Telecommunication Union Conference (Nairobi, 1982), the Expanded Band Conference was scheduled to be held in two sessions. Its purpose is to implement the action of the 1979 World Administrative Radio Conference which revised portions of the frequency allocation tables of the International Radio Regulations to make this band available for broadcasting on a primary basis in Region 2 (the Western Hemisphere). The use of this band in other areas of the World is beyond the scope of this Conference.

[2] *First Notice of Inquiry*, 49 Fed. Reg. 21419, May 21, 1984; and *Second Notice of Inquiry*, 50 Fed. Reg. 2077, Jan. 15, 1985.

[3] *First Report*, 50 Fed. Reg. 33844, August 21, 1985; and *Second Report*, 51 Fed. Reg. 8706, March 13, 1986.

[4] The Second Session of the Conference is scheduled to take place in Rio de Janeiro, Brazil, from May 23 through June 9, 1988.

[5] The final text of the Regional Agreement and the associated Broadcasting Plan are to be included in the Final Acts of the Conference.

[6] 52 Fed. Reg. 27570, July 22, 1987.

[7] _____ Fed. Reg. _____, _____, 1988.

[8] The Commission participated in such preparatory activities as meetings of working parties of Study Groups of the International Radio Consultative Committee (CCIR) and meetings of the Inter-American Telecommunications Conference. Also, the FCC Industry Radio Advisory Committee addressed issues concerning the Expanded Band Conference.

[9] The FCC's Recommendations noted that treating the new band as an extension of the existing band makes it possible to use many of the existing planning tools and computer techniques that already have been successfully applied to AM planning activities in the Region.

[10] In the *Second Report*, the Commission also adopted a recommendation that a maximum power of 10 kW be used in implementing the Plan.

[11] The Commission also will continue to meet with other federal agencies on matters of mutual concern. Bilateral and multilateral meetings with other administrations in Region 2 also are anticipated. Likewise, meetings of Permanent Technical Committee II (broadcasting) of CITEL are planned to consider issues expected to arise at the Second Session of the Conference.

[12] Originally, this Conference was empowered to deal only with broadcasting uses of the expanded band, but by action of the Administrative Council of the ITU, its scope has since been enlarged to cover all uses of the band within the Region. In addition, Resolution No. 953 adopted at the 41st session of the Administrative Council adopted the agenda for the 1988 Space Conference (ORB-88). The agenda includes as item 15 the following: "to consider and, if appropriate, revise No. 480 of the Radio Regulations only to the extent necessary to ensure that implementation of broadcasting stations in Region 2 in the band 1605-1705 kHz is without prejudice to the regional broadcasting plan adopted at the Second Session of RARC BC-R2". Appropriate text is to be developed at the Second Session. This situation arises because, unlike World Conferences, Regional Conferences are not empowered to revise the Radio Regulations. As a consequence, the Final Acts of a Regional Conference are not binding as to non-signatories. Thus, a revision of No. 480 of the Radio Regulations by ORB-88 is necessary to ensure that the actions taken by non-signatories are not in derogation of the broadcasting Plan.

[13] Recommendation 504 of the international Radio Regulations states that the use of the expanded band by the broadcasting service is not to commence before July 1, 1987 for the frequencies between 1625-1665 kHz, nor July 1, 1990 for the frequencies between 1665-1705 kHz. The international Radio Regulations (No. 419) provide that permitted and primary services have equal rights, except that, in the preparation of frequency plans, the primary service, as compared with the permitted service, shall have prior choice of frequencies.

[14] *See* , *Implementation of the Final Acts of the World Administrative Radio Conference (Geneva 1979)* 49 Fed. Reg. 2358, January 19, 1984.

[15] Although cordless telephones may currently operate in the 1625-1800 kHz band, production of such devices was not allowed after October 1, 1984. *See Order Granting Conditional Waiver*, 48 Fed. Reg. 4788, February 3, 1983. Moreover, we do not expect that significant numbers of these units will be operating in this spectrum when broadcasting is implemented in this band as these devices have a short life-expectancy and interim frequency spectrum at 46 and 49 MHz was provided for their use. *See Report and Order* in *Amendment of Part 15 to Add New Interim Provisions for Cordless Phones* 49 Fed. Reg. 1512 January 12, 1984.

[16] The private land mobile users include Fire Radio, Police Radio, Petroleum Radio, Forest Products Radio, and the Motion Picture Radio Services, all regulated by Part 90 of the FCC Rules and Regulations, as well as the Radiolocation Service. Traveler's Information Stations within the Local Government Radio Service are also regulated by Part 90. Remote Pick-up Broadcast Stations are regulated by Part 74. Both Alaska-Public Fixed Stations and stations on-board ships in the Alaska area are regulated by Part 80.

[17] Due to the unique situation in Alaska, which results in numerous other broadcast opportunities, it may be possible to permit non-broadcast services now operating on the expanded band in that state to continue such operation.

[18] It is important to note that there are differences in the treatment to be given to the frequencies in the expanded AM band. It is expected that the U.S. would be allotted 1620, 1640, 1660, 1680 and 1700 kHz, with 1700 being used for TIS purposes. Neighboring countries would be allotted the remaining five channels. This means that full flexibility would exist on four of the nine non-TIS channels (*viz.* 1620, 1640, 1660 and 1680 kHz) while on the remaining five, there would be restriction on their use. Thus, in areas near these neighboring countries, these channels would be limited by the need to comply with more stringent international interference limitations. In addition, those five channels would be subject to increased interference from stations in these other countries. However, in areas removed from the border, these additional restrictions would not apply, and the same standards would govern the use of all nine channels.

[19] FCC News Release, December 4, 1987.

[20] *See* Appendix 1 of the *Report on the Status of the AM Broadcast Rules*, Mass Media Bureau Staff, April 3, 1986.

[21] 740 F. 2d 1190 (D.C. Cir. 1984).

[22] The multiple ownership implications of such approach are discussed at paragraphs 78-85.

[23] *See* page 2 of the June 21, 1985, *Report on Allocations Policy Alternatives for Expansion of the AM Broadcast Band* issued by the Allocations Subgroup.

[24] We are aware of the need to proceed in this examination in a manner that comports with the expenditure limitations imposed by the recently enacted reconciliation bill, Pub. Law 100-202 signed by the President on December 22, 1987, and nothing proposed herein would reduce or weaken in any way our existing comparative licensing preferences.

[25] For example, if a traditional approach is taken, we would not plan to allow what appears to be the inefficient use of this band to establish daytime-only stations. If a non-traditional approach were to be taken, this question would be answered by the "national licensee", which would make its own market-based decision.

[26] This possibility, raised initially in the *First Notice* in this proceeding, has generated considerable response. This information needs to be up-dated to take into account the several actions that have been taken by the Commission affecting daytime-only stations. In particular, virtually all daytime-only stations on Class I-A foreign clear channels have been given nighttime operating authority. *Nighttime operations on Canadian, Mexican and Bahamian clear channels*, 50 Fed. Reg. 24515, June 11, 1985. Similar action has been taken for daytime-only stations on regional channels and on 940 and 1550 kHz. However, not all daytime-only stations have been able to benefit from these actions. In fact, it is estimated that between 100 and 200 of these stations will not qualify for full-time operation at *any* power. Commenting parties should take these and other related matters into account in making recommendations in this regard.

[27] Other TIS stations operate on 530 kHz, but these stations are outside the scope of the current proceedings.

[28] On July 16, 1987, the Commission adopted a *Notice of Inquiry*, 52 Fed. Reg. 31795 (August 24, 1987), in MM Docket No. 87-267, for the purpose of providing a comprehensive review of the technical principles pertaining to AM broadcast assignment criteria and related issues. To whatever extent appropriate, the modifications made as a consequence of that proceeding will be

applicable to the 1605-1705 kHz band as well as the 535-1605 kHz band. Comments that are applicable to the entire 535-1705 kHz band, and which are not limited simply to 1605-1705 kHz, should be addressed to MM Docket No. 87-267 rather than this docket. We intend to proceed with implementation of the expanded band even if the proceeding in MM Docket No. 87-267 is not fully resolved at that point.

[29] *E. g.*, Class II stations are subclassified as Class II-A, II-B, II-C, II-D or II-S stations.

[30] By *Report and Order* (FCC 87-356) in MM Docket No. 87-131, adopted on November 18, 1987, the minimum Class III power which was 500 watts has now been reduced to 250 watts.

[31] This would provide the level of daytime protection accorded to most current classes of stations along with a more modest level of nighttime protection geared to permitting a larger number of local service stations.

[32] There are isolated exceptions, such as the newly authorized nighttime operations for daytime-only stations and a handful of the stations that were authorized before the current minimum was established.

[33] The issue of whether to modify the normally protected contours of AM stations was raised in MM Docket No. 87-267. *See* n. 26, *supra*.

[34] This is the same as Figure 1a in Section 73.190 of the Commission's Rules.

[35] If the U.S. station is not located in a U.S. allotment area, it could receive even more interference.

[36] For example, one zone could be that portion of the U.S. within 330 kilometers of foreign countries. In that zone, stations would receive protection to their 3.3 mV/m nighttime ground-wave contours. In other zones, the required nighttime protection might be greater.

[37] For a more detailed discussion of skywave propagation curves, *see* paras. 64-72 of the *Notice of Inquiry*, 52 Fed. Reg. 31795, August 24, 1987, in MM Docket No. 87-267.

[38] When Figure 2 was developed, it was thought that these differences result because of the effects of geographic latitude on AM skywave signal propagation. Later, it was recognized as a function of geomagnetic latitude.

[39] *See* paras. 70 and 71, *supra*.

[40] *See* Section 73.22 of the Commission's Rules.

[41] *Notice of Proposed Rule Making* in Docket No. 15804, 25 RR 1615 at paragraph 27, (1963).

[42] MM Docket No. 87-267, 52 Fed. Reg. 31795, August 24, 1987, paras. 47-58.

[43] *Notice of Proposed Rule Making* in MM Docket No. 84-231, 49 Fed. Reg. 11214, March 26, 1984.

[44] *Amendment of Sections 73. 3572* and *73. 3573 Relating to Processing of FM and TV Broadcast Applications* in MM Docket No. 84-750, *Report and Order, FCC 85-125; Memorandum Opinion and Order*, FCC 85-555.

[45] A mutually exclusive situation arises when two or more applicants contemporaneously file for use of the same broadcast frequency or for frequencies whose use would electronically interfere with each other.

[46] *Report and Order*, 52 Fed. Reg. 7420, March 11, 1987.

[47] Unlike FM broadcasting, there is no Table of Allotments for AM broadcasting. An applicant wishing to operate on an AM frequency locates an available AM channel and files an application to operate on it. Public notice is given of that application and a cut-off list provides thirty days for application by any party wishing to compete for use of that channel. If no competing application is filed and the application is technically and legally sound, it may be granted. If a competing, mutually exclusive application is filed, however, another cut-off list is released to be followed by a comparative license hearing to evaluate who should receive the permit to construct on that particular AM frequency.

[48] 47 U.S.C. Sections 307(a), 309(a).

[49] 47 U.S.C. Section 309(e).

[50] *See* Section 308(b) of the Communications Act.

[51] Diversification of control of the media of Mass Communications and integration of ownership in the day-to-day management of the broadcasting station are just two such comparative criteria. *A 1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), delineated the basic guidelines for the comparative evaluation of mutually exclusive applicants for new broadcast stations. However, it is through case by case adjudication that the Commission has developed standards for determining the significance of preferences for each of the comparative factors and the relative weights to be accorded these preferences in selecting the best applicant.

[52] *Notice of Inquiry and Proposed Rule Making*, 45 Fed. Reg. 29335, May 2, 1980.

[53] *Cellular Mobile Systems of Pennsylvania v. FCC*, 782 F2d 182 (D.C. Cir. 1985).

[54] For the Commission's lottery procedure governing mass media applications, see 47 C.F.R. 1.1601-1.1604; 1.1621.

[55] *See* Section on eligibility criteria, para. 16 *supra*.

[56] *See* Appendix 1 of the Report on the *Status of the AM Broadcast Rules*, Mass Media Bureau Staff, April 3, 1986.

[57] *Memorandum Opinion and Order*, 100 FCC 2d 74 (1984).

[58] 2 FCC Rcd 1138 (1987), *summarized*, 52 Fed. Reg. 8086, March 16, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Offshore Telephone Company

Request To Participate in the National Exchange Carrier Association, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 1988 ; Released: July 7, 1988

By the Commission:

I. INTRODUCTION

1. We initiated this proceeding to examine a request by The Offshore Telephone Company (OTC) to join the National Exchange Carrier Association Inc. (NECA) and to participate in traffic sensitive (TS) and non-traffic sensitive (NTS) pools administered by NECA on behalf of its member local exchange companies. As further explained below, we find that OTC does not provide local exchange telephone service, a requisite for NECA membership.

II. HISTORY OF PROCEEDING

2. On March 4, 1966, OTC's predecessor, Gulf Coast Telephone Company (Gulf Coast), was authorized under Section 214 of the Communications Act, 47 U.S.C. § 214, to provide common carrier communications service in the Gulf of Mexico. *See Gulf Coast Telephone Company*, 2 FCC 2d 614 (1966) (*1966 Order*). The *1966 Order* authorized Gulf Coast to construct cable to provide telephone, telegraph and telemetry communications between oil and gas drilling platforms and rigs in the Gulf of Mexico, on the one hand, and points within the state of Louisiana, on the other hand. The other Commission authorizations formerly held by Gulf Coast included a cable landing license and authorizations to provide service under Title III of the Act, 47 U.S.C. Title III. In 1969, Gulf Coast filed for bankruptcy. OTC (a wholly-owned subsidiary of Data Com Industries,[1] which was originally called the Louisiana Offshore Telephone Company) purchased Gulf Coast's transmission facilities. Subsequently, this Commission's Common Carrier Bureau issued an Order approving the transfer of Gulf Coast's operating licenses and Section 214 authority to OTC. *See* Order and Certificate of the Chief, Common Carrier Bureau, Mimeo No. 50227, released June 4, 1970.

3. Currently, OTC offers service to a group of oil and gas companies located in the Gulf of Mexico pursuant to end-on-end rate arrangements[2] with carriers that provide interconnection to the local and national telephone networks. OTC's request to participate in NECA is part of a lengthy series of proceedings before this Commission concerning these rate arrangements. In a complaint filed December 28, 1976, OTC claimed that, by their refusal to include OTC in toll settlement arrangements, [3] South Central Bell Telephone Company (SCB) and the American Telephone and Telegraph Company (AT&T) unlawfully discriminated against OTC in a manner proscribed by Section 202(a) of the Communications Act, 47 U.S.C. §202(a).[4] OTC requested this Commission, pursuant to Section 201(a) of the Communications Act,[5] to direct SCB and AT&T to include OTC in these toll settlement arrangements. OTC later amended its complaint to include a request for damages based upon its claim for past discrimination against SCB and AT&T. This Commission assigned OTC's claim for prospective relief to an Administrative Law Judge (ALJ) for a ruling on the evidence. *Offshore Telephone Company*, 66 FCC 2d 184 (1977), and deferred OTC's retrospective claim for damages pending the ALJ's resolution of the Section 201(a) issues. *Offshore Telephone Company*, 68 FCC 2d 63, 65 (1978).

4. In December 1980, the ALJ ruled that OTC had failed to demonstrate that the public interest warranted its inclusion in toll sharing. Accordingly, the ALJ denied OTC's request that AT&T and SCB be required to include OTC in toll sharing arrangements. *Offshore Telephone Company*, 97 FCC 2d 392 (1980) (*Initial Decision*). The ALJ's decision was affirmed by this Commission. *Offshore Telephone Company*, 97 FCC 2d 377 (1983) (*Commission Decision*). Subsequently, however, under the Bell System divestiture, all joint service arrangements among the Bell System companies and Independents based on division of revenues and settlements were terminated. Consequently, the United States Court of Appeals for the District of Columbia Circuit vacated the *Commission Decision* and remanded and ordered this Commission to dismiss as moot the proceedings related to OTC's request to be included in toll sharing arrangements. *Offshore Telephone Company v. FCC*, No. 83-2055 (D.C. Cir. Sept. 21, 1984). Accordingly, we dismissed OTC's Section 201(a) claims and directed OTC to file pleadings concerning its discrimination allegations based on Section 202(a). *Offshore Telephone Company*, Mimeo No. 4282 (released May 2, 1985).

5. On May 31, 1985, OTC filed a petition before the United States Court of Appeals for the District of Columbia Circuit, seeking an order, "in the nature of a writ of mandamus," directing this Commission to conduct trial-type hearings regarding OTC's Section 202(a) claim. OTC requested this Commission to defer the pleading schedule relating to its complaint pending the Court's ruling on its petition for a writ of mandamus. The Court denied OTC's petition. *Offshore Telephone Company v. FCC*, No. 85-1319 (D.C. Cir. June 19, 1985). OTC filed several petitions before this Commission requesting extensions of time, and finally filed a brief under protest on July 31, 1985. Between July 1985 and September 1986, a voluminous record consisting of briefs, responsive pleadings, factual stipulations, witness statements and additional evidence, was compiled in the complaint proceeding. The Bureau determined that the record did not demonstrate unlawful discrimination against OTC. *Offshore Telephone Co. v. South Central Bell Telephone Co., et al.*, 2 FCC Rcd 4546, 4557 (1987), *appl. for review pending*.

III. OTC'S REQUEST TO JOIN NECA

6. On January 24, 1986, OTC filed a second petition for writ of mandamus against this Commission requesting the United States Court of Appeals for the District of Columbia Circuit to direct this Commission to determine whether OTC is eligible to join NECA[6] and to resolve OTC's

pending complaint against AT&T and SCB. The Court of Appeals held oral argument on OTC's mandamus petition on January 30, 1987. On February 19, 1987, the Court denied OTC's petition and stated that this Commission "has not engaged in delay so unreasonable as to justify directions from the judiciary." *Offshore Telephone Co. v. FCC*, 811 F.2d 676 (D.C. Cir. February 19, 1987) (table).

7. After OTC filed its mandamus petition, by letter dated October 15, 1986, the Common Carrier Bureau's Tariff Division initiated this proceeding to determine OTC's status with respect to NECA (Bureau Letter), 1 FCC Rcd 232 (1986). The letter stated that the Bureau would construe as a formal request to participate in NECA various letters and pleadings filed by OTC in its complaint proceeding. Also by this letter, the Bureau directed OTC to respond to questions designed to elicit information that would indicate whether OTC should be allowed to participate in NECA. OTC filed a letter on October 23, 1986 (October 23 Letter) seeking clarification of the Bureau Letter, a response to the Bureau's questions on November 14, 1986 (Response), and a supplementary response on December 15, 1986 (Supplement). On January 15, 1987, comments were filed by AT&T; the Ameritech Operating Companies (Ameritech); the Bell Atlantic Telephone Companies (Bell Atlantic); BellSouth Corporation (BellSouth); and the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West). Five oil producing companies[7] that subscribe to OTC's service submitted letters supporting OTC's request. On January 29, 1987, OTC filed a reply (Reply).

IV. OTC'S FACILITIES AND SERVICES

8. As stated above, OTC is engaged in the business of providing communications services to industrial subscribers located in the Gulf of Mexico. According to OTC, Gulf Coast initially used cable facilities to provide communications services in the Gulf. OTC states, however, that technologies improved over time, and eventually radio service became more economical and reliable than cable. Accordingly, OTC transferred most service to radio facilities. OTC explains that currently its microwave radio network covers 526.7 miles. OTC expects to increase this network by 78.7 miles.[8]

9. OTC presently provides telephone services to subscriber stations established on manned and unmanned oil and gas producing platforms and rigs,[9] barges, and other maritime vessels located in the Gulf of Mexico. OTC states that presently it serves 62 subscriber stations including rigs and platforms that frequently are moved throughout the Gulf.[10] Most of these subscriber stations are located beyond Louisiana's three-mile jurisdictional limit. According to OTC, these structures are used by its subscribers "an average number of days ranging from 29 to 324 days during the period 1984 to 1986, with a median and a mode of 107."[11] OTC states that between 1984 and 1986, it provided 1,125 main telephone stations.[12] OTC uses Offshore Radio Telecommunications Service (ORTS) and temporary rural radio stations to link its subscribers to land-based connecting carriers. In addition, OTC maintains a submarine coaxial cable system that may be used as a backup to route calls to SCB's switch in Morgan City, Louisiana. Once delivered to land-based carriers in Louisiana, calls originating on OTC's facilities are switched by SCB at Morgan City, by Cameron Telephone Company (Cameron) at Rutherford Beach, Louisiana or by Lafourche Telephone Company (Lafourche) at Grand Isle, Louisiana.[13] OTC describes this transmission path as follows: At the subscriber's premises, a network interface (typically an RJ-11-C jack) is provided, to which terminating equipment (i.e., customer premises equipment, such as a telephone hand set) is attached. From this point, a "transmission path" is created either through a radio link which connects to Offshore's main transmission sites, or directly via multiplexers and OTC transmission links routed toward the shore. Once at the shore, OTC's facilities are interconnected to those of the adjacent carrier, whether these facilities are connected to the public switched network or to private (i.e., off-network) systems.[14]

10. In its interstate tariff, OTC describes several services including measured rate telephone service, radio telephone service, MTS, foreign exchange (FX) service, private line service[15] and dedicated voice/data service.[16] OTC discontinued its measured rate telephone service in 1984. OTC's interstate tariff described this service as service that originates or terminates at telephones located at exchange stations designated by OTC as measured rate telephones. Calls from measured rate telephones were handled manually by OTC employees at OTC's switchboard in Morgan City and were billed to a credit card or to the called party at the rate of4.50 for the first three minutes or fraction thereof, and1.50 for each additional minute to connect to landline switching facilities.

11. According to OTC's interstate tariff, service to subscribers not connected directly to OTC's wire facilities is provided by use of radio telephone channels that link temporary or fixed remote radio stations and facilities OTC designates as fixed central office stations.[17] The monthly service charge for radio telephone service is900. Callers incur additional charges for service that is transmitted beyond OTC's facilities. OTC bills customers3,000 to install radio station equipment and1,500 to remove the equipment. MTS calls that originate on facilities provided by OTC are "handled through the facilities of the telephone company and . . . directed to inland destinations outside of the participating carrier's local inland exchange area."[18] For fixed rate MTS calls, OTC's subscribers pay OTC's fixed monthly basic exchange charge of456 for OTC's portion of the service. In addition, OTC recoups from its subscribers the business exchange charge of41.00 per line assessed by SCB on each business exchange line ordered by OTC on behalf of its subscribers, and any applicable message unit charges that may be assessed by SCB.

12. OTC describes its FX charge as a recurring monthly charge that applies "in instances where a subscriber desires 'service connection' from his premises located in an established Exchange Area to the Central Office contained in a Division other than that to which the Exchange is normally connected."[19] This service is billed at a rate of 13.00 per channel per statute mile computed on an airline mileage basis. Rates for dedicated voice/data service are identical to those that apply to FX service (*i. e.*, 13.00 per channel per statute mile per month).

13. While OTC is authorized by this Commission to provide interexchange service in accord with its federal tariff, OTC Tariff F.C.C. No. 2, OTC is not authorized by any state to provide intrastate communications service. The Louisiana Public Service Commission (Louisiana PSC) has stated that OTC has a tariff on file in Louisiana,

but that it is not authorized to provide service within the state's territorial boundaries. The Louisiana PSC explains that:

> In Louisiana, the Public Service Commission does not issue certificates of public convenience and necessity to telephone companies. Telephone companies are franchised by municipalities or local governing authorities and thus becoming [sic] a public utility are required to file tariffs and submit to regulation by the Louisiana Public Service Commission . . . . There are no indications or records on file with the Public Service Commission filed by Offshore Telephone Company which reflect the filing of territorial service maps or the obtaining of franchises from local governing authorities to provide local exchange land line telephone service. Additionally, Offshore Telephone Company has not requested nor obtained authority from the Louisiana Public Service Commission to provide intralata interexchange or long distance telephone service within the LATA in which South Central Bell and Lafourche Telephone Company provide local exchange services.[20]

V. PLEADINGS

A. *OTC's Response*

14. OTC's basic contention is that it provides telephone service to people who use this service for both business and personal reasons, and that there exists a "philosophy of equality of treatment of the rate paying public" which "has been applied universally, except for the rate paying public using an OTC telephone." OTC Response, Sec. 11, p 2. It claims that there should not be different toll rates for OTC's customers than for other customers. In challenging what it considers the unfair treatment of OTC customers, it asserts that users of office telephones in Rochester, N.Y. use their telephones with no rate differential for business or personal calls; that callers at Disney World pay the same rate whether they are employees or tourists; that Indians residing in the Grand Canyon pay no higher rate in spite of the "high cost per station;" and that people living in bush communities in Alaska have telephone service at no different rate "even though the nature of these telephones was such they could not be used for local exchange calls." *Id.* By analogy, OTC thus argues that the fact that the telephone system is owned by a business entity, or incurred high costs per station, or could not be used for local calls, is not a basis for rate differences or for excluding the telephone company from NECA membership. OTC also claims that the current arrangements are not fair to its customers, who generate "vast sums of toll revenue" which is not available to lower the subscribers' monthly rates.

B. *Comments on the OTC Response*

15. In their responses to OTC's submissions, AT&T, Ameritech, Bell Atlantic and BellSouth all argue that OTC has not demonstrated that it provides exchange access service or that it should participate in the NECA pooling process. AT&T observes that, in other proceedings, OTC has demonstrated that it is not in the business of providing exchange access service.[21] AT&T remarks that OTC's service is primarily end-link in nature, that it originates almost exclusively from temporary maritime facilities, and thus it is limited to a narrow body of industrial maritime users. As such, AT&T argues, OTC's service is similar to that provided by maritime carriers. AT&T notes that OTC's service is "just the opposite from that generally experienced by local exchange carriers, 92% of whose calling was between customers within the same local calling area."[22] AT&T argues that OTC's low density subscriber area adds to OTC's high costs. These factors, AT&T argues, distinguish OTC from local exchange carriers.[23] AT&T concludes that OTC incorrectly claims that high cost, end-link service providers are local exchange carriers. Moreover, AT&T adds, OTC has failed to advance any policy considerations or public interest objectives that support its request to participate in NECA.[24]

16. While Ameritech offers no criteria for NECA eligibility, it argues that OTC has failed to present facts, legal arguments or policy considerations that justify its participation in NECA. Ameritech states that, in 1983, OTC failed to demonstrate that its participation in the division of revenues process was warranted. Ameritech states further that OTC's responses to this Commission's questions indicate that nothing has changed since 1983. Consequently, Ameritech continues, OTC is not eligible to participate in the NECA pooling process.[25] Ameritech notes that, in 1984, OTC did not generate local revenues and that, with the exception of one intrastate customer, OTC's service presently is interstate in nature. According to Ameritech, OTC provides "something akin to resold exchange service" to its one intrastate subscriber.[26] Participation by resold exchange service providers in the NECA pooling process is inconsistent with the purposes of NECA, Ameritech concludes.

17. Bell Atlantic argues that OTC is not certified by the Louisiana PSC as a provider of local exchange service. It notes further that OTC's filings do not indicate that the Louisiana PSC has issued a certificate of public convenience and necessity authorizing OTC to provide local service.[27] Bell Atlantic observes that OTC's customers are business users, that much of OTC's service involves dedicated private lines, that many of its locations are temporary, and that OTC performs no local switching. Consequently, Bell Atlantic maintains, OTC's business does not resemble traditional local exchange service, and OTC fails to qualify as a local exchange carrier within the meaning of Section 3(r) of the Communications Act, 47 U.S.C. § 153(r).

18. US West contends that NECA membership should be limited to dominant telephone companies that provide fixed service to residential subscribers. It argues that, in view of the competition that exists in the Gulf of Mexico, OTC presently is not a dominant telecommunications provider in the region.[28] Moreover, US West adds, OTC does not provide basic residential service, but instead provides private line interstate service. US West contends that OTC is mistaken in its claim that it is the only telephone company that is not permitted to participate in NECA. OTC is similar to cellular carriers, radio common carriers and shared tenant service (STS) providers which do not participate in NECA's pooling arrangements, US West argues.[29] US West concludes that the addition of these types of telephone companies in the NECA pooling process would undermine this Commission's access plan. It observes that if OTC were permitted to join NECA's mandatory carrier common line pool and high cost fund, all telephone company subscribers would be forced to subsidize OTC's oil and gas company subscribers.[30]

19. The five OTC customers who filed comments give nearly identical reasons for supporting OTC's request to participate in NECA: (1) OTC "could get some share of the tremendous amount of long distance revenues our company generates using [OTC] phones," (2) OTC "could use this revenue to lower our monthly charges for basic telephone service," and (3) the oil company "would have the benefit of paying the same rate for a long distance call using [OTC's] telephone system as we do using any other telephone company in the United States that we use to place similar calls."[31]

C. *OTC Reply*

20. In response to these arguments, OTC argues that the status of its subscribers as business or residential telephone users is not determinative of whether it should participate in NECA.[32] It states that it is not a private telephone provider, a radio common carrier, a specialized common carrier or an interexchange carrier. Instead, OTC characterizes itself as a regulated local exchange carrier that uses facilities it owns or leases to provide local service to a community of interest located in the Gulf of Mexico. As such, OTC continues, it should be permitted to join NECA and participate in NECA's pools. OTC observes that this Commission's rate integration policies protect ratepayers located in regions with unique geographic and cost characteristics from excessive rates for telephone service. OTC also argues that, by issuing a public notice announcing OTC as a participant in a lottery conducted to award a cellular radio frequency to a tentative selectee chosen from a group of wireline local exchange carriers, this Commission has "classified OTC as a domestic wireline carrier and one equivalent to SCB."[33] OTC claims that our rate policies and our treatment of OTC as a wireline local exchange carrier in the cellular lottery proceedings[34] supports its request to join NECA.

VI. DISCUSSION

21. In order to understand the substance of OTC's request, a review of past and present compensation mechanisms among telephone companies is necessary. Traditionally, the Bell System compensated non-Bell independent telephone companies for the use of their facilities through settlement contracts. The amount of compensation was based upon costs allocated to the interstate jurisdiction by the Separations Manual. All local companies participated in AT&T's long distance tariffs for the joint provision of services and in the corresponding settlement arrangements. Only traditional local exchange carriers were included in these settlement arrangements, however, and these arrangements applied only for traditional telephone services. Specialized endlink services, such as radiotelephone, maritime, and mobile services, were not included in cost and revenue sharing arrangements, whether or not they were provided by local telephone companies. The decision of the ALJ denying OTC's request to be included in toll sharing, as affirmed by this Commission, was based on the finding that the public interest would not be served by the inclusion of OTC's services within the rate and cost settlement mechanisms developed for traditional exchange and toll services.[35]

22. With the advent of long distance service competition, this Commission embarked on a program to replace settlement arrangements with access tariffs.[36] Under the access program, instead of jointly providing service with AT&T, local companies provide access to all long distance carriers at the same tariffed rates (where equal access is available) and local customers receive long distance services from the long distance carrier of their choice. This program achieves four policy goals, (1) preservation of universal service; (2) elimination of unreasonable discrimination and undue preferences among rates for interstate services; (3) efficient use of the local network; and (4) prevention of uneconomic bypass.[37]

23. In developing this system, this Commission was particularly cognizant of the need to establish effective rules which would assure that local exchange companies would be fairly compensated and which, at the same time, would revise those compensation mechanisms to align rates more closely with costs. To accomplish these tasks, this Commission established NECA and authorized the Association to assume many of the functions formerly handled by AT&T. Accordingly, NECA files interstate access tariffs on behalf of its members, local exhange telephone companies, based upon the pooled costs and revenues of member telephone companies. Each member of the NECA pool charges the same rate, regardless of its actual costs, and each is compensated from pool revenues for its interstate costs.[38]

24. This arrangement provides significant advantages for this Commission and participating local exchange companies. For example, a single administrative staff calculates NECA rates and files tariffs on behalf of all participating companies. NECA also administers programs to assist high cost areas and customers who might otherwise be unable to afford telephone services. The common line (CL) pool as administered by NECA also plays an essential role in achieving more cost-based rates: as carriers shift toward recovering non-traffic-sensitive costs more accurately through per line rates, NECA files corresponding reductions in carrier common line (CCL) rates resulting in lower long distance rates and more efficient use of the switched network.[39]

25. By its request, OTC has asked this Commission to require local exchange companies to participate with OTC in the cost and revenue pools which this Commission established for local exchange telephone companies as a replacement for pre-access settlement arrangements. Although this request presents many of the same considerations as OTC's request for inclusion in these settlement arrangements, this request presents the first occasion upon which to address these questions as they might be affected by the access rules and the principles on which they are based.

26. Under our rules, membership in NECA is "limited to exchange carriers that participate in access charge revenue pools that are administered by the association . . . ."[40] Section 69.601(b) of the rules, 47 C.F.R. § 69.601(b), states that: "[a]ll telephone companies that participate in the distribution of Carrier Common Line revenues collected by the association shall be deemed to be members of such association."

27. Section 69.601(b) of the rules implicitly requires that NECA members must, at a minimum, be telephone companies. Section 69.601(b) also implies that telephone companies eligible for NECA membership provide the basic exchange service for which the distribution of Carrier Common Line revenues would be justified. Moreover, since membership in the Association is limited to companies that participate in access revenue pools,[41] NECA members must provide access service. Non-access revenues

and costs are not included in the pools. Thus, in order to decide whether OTC is eligible for NECA membership we must address several issues. Fundamental to our resolution of this matter are questions concerning whether OTC is a telephone company, whether it provides local exchange service and, whether it provides access service. Factors we shall consider in resolving issues related to OTC's status include the effect of this Commission's prior regulation of OTC as a common carrier, OTC's service and facilities, and OTC's customer and cost characteristics. These issues are addressed separately below.

A. ***Local Exchange and Access Service***

28. As noted by the Bureau, OTC bears the burden of demonstrating that its participation in NECA is warranted. Bureau Letter at 2. Accordingly, in order to demonstrate that it is eligible for NECA membership, OTC must demonstrate that it is similar to the carriers that presently participate in the Association. That is, OTC must demonstrate that it is a telephone exchange company, that it provides local exchange, and that it provides access service.

29. Part 69.2(cc) of this Commission's Rules, 47 C.F.R. § 69.2(cc), defines a telephone company as a "carrier that provides telephone exchange services as defined in Section 3(r) of the Communications Act of 1934." Section 3(r) of the Communications Act, 47 U.S.C. § 153(r), states:

> Telephone exchange service means service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange and which is covered by the exchange service charge.

30. The United States Court of Appeals for the Fourth Circuit explains that "telephone exchange service" is a "statutory term of art . . . [that] means service within a discrete local exchange system . . . ."[42] This Commission has further described exchange service as "the provision of two-way voice communications between individuals by means of a central switching complex which interconnects all subscribers within a geographic area." *See Domestic Public Radio Service*, 76 FCC 2d 273, 281 (1980); *Midwest Corp.*, 53 FCC 2d 294, 300 (1975).

B. ***Regulatory Treatment of OTC***

31. OTC argues that, in the past, this Commission has allowed OTC to perform some of the same activities as local exchange telephone companies. For example, OTC notes that it was authorized by this Commission to provide resold interstate communications in accord with Section 214 of the Act. OTC remarks in addition that the FCC previously determined that OTC provides service pursuant to its federal tariff which is local exchange service; that it has been included in a wireline cellular lottery,[43] that it is permitted to use rural radio frequencies reserved for wireline carriers,[44] and that it holds licenses for Telephone Maintenance Radio Service frequencies reserved for wireline carriers. Moreover, OTC notes that it has been classified as a dominant carrier in the Gulf of Mexico. OTC reasons, apparently, that this regulatory treatment constitutes a finding by this Commission that it is a local exchange carrier.

32. For the following reasons, we find OTC's arguments unpersuasive. First, OTC's reliance on this Commission's grant of authority under Section 214 to provide resold interstate WATS service is misplaced. Carriers need not be local exchange carriers to receive 214 authorizations. AT&T, for example, an interexchange carrier, must obtain 214 authorizations. In fact, local exchange lines are generally excluded from the application of Section 214.[45] While the *1966 Order* did grant OTC's Section 214 application, and thereby authorized OTC to provide communications service on a common carriage basis, neither the *1966 Order* nor OTC's Section 214 authorization contained an express or implied determination with respect to OTC's status as a local exchange carrier.

33. OTC's claim that dominant competitive carrier status in the Gulf of Mexico is evidence that OTC is a local exchange carrier is also unfounded. OTC's classification as a dominant carrier within the area in which it provides offshore service simply is not relevant to whether it provides local exchange service and access service. Classification of a carrier as dominant or nondominant in a particular market does not determine whether the carrier provides or resells local, toll or interstate services.[46] Upon our review of OTC's facilities application, this Commission granted OTC authorization to resell interstate communications services and characterized OTC as a dominant carrier for these services.[47] This Commission did not, however, make any determination that OTC provides local exchange service.

34. OTC notes that it was selected first in the cellular lottery conducted by this Commission on September 29, 1986 for the Frequency Block B frequencies in the Houma-Thibodaux, Louisiana, metropolitan statistical area (MSA),[48] and argues that its participation in wireline lottery proceedings supports its request to participate in the NECA pools as a local exchange carrier. We disagree. In the lottery selection process, carriers designated themselves as wireline or nonwireline. The Commission did not judge the carrier's qualifications merely by selecting the carrier in the lottery.[49]

35. Further, in an Order released August 3, 1987 by the Mobile Services Division of the Common Carrier Bureau,[50] the Division determined that OTC is unqualified and ineligible to hold the license for the wireline frequency for the Houma-Thibodaux market. Accordingly, OTC's claim that voluntary participation in wireline lotteries is evidence of status as a local exchange carrier is without merit. We also reject OTC's contention that this Commission determined that OTC is a wireline carrier because this Commission permitted it to use radio spectrum allocated for wireline carriers. In fact, no determination was ever made regarding the wireline status of OTC.[51]

36. OTC claims in its Reply that "the FCC determined . . . [t]hat Offshore operates pursuant to an FCC tariff by which it provides, *inter alia*, basic exchange service". OTC Reply at 7. It is unclear whether OTC is claiming that the FCC has determined simply that OTC operates pursuant to an FCC tariff or that the FCC has determined that the service OTC provides under tariff is local exchange service. In any case, OTC does not identify the FCC order or other document in which either possible determination was allegedly made nor are we aware of any such document. As to the former interpretation of OTC's Reply, we agree that OTC has a tariff on file with this Commission. As to the latter interpretation we note that the question of

whether the service OTC provides under its tariff constitutes local exchange service is, of course, the precise issue in the instant proceeding. We also note that OTC filed an editorial revision to its tariff which renamed as "local exchange service" the service it had described as "private line service."[52] Merely renaming the service in its tariff does not change the nature of OTC's service offerings, and the fact that the tariff edits were allowed to go into effect does not imply that the Commission accepted a change in the carrier's status.

37. Thus, contrary to OTC's claims, this Commission has not addressed prior to the instant proceeding the question of whether OTC is a local exchange carrier, and none of the Commission's actions represents an implied determination of that status. Indeed, no formal proceedings have ever been conducted to determine OTC's status with respect to local exchange carriage. None of the indicia of exchange carrier status claimed by OTC -- the grant of authority to provide service under Section 214, the provision of interstate service under its this Commission's characterization of OTC as a dominant carrier, the inclusion of OTC in a wireline cellular lottery based on OTC's self-designation as a wireline carrier, or the allocation to OTC of radio spectrum reserved for wireline services -- constitutes a determination that OTC provides exchange access service, that OTC is a local exchange carrier, or that OTC should be permitted to participate in NECA.[53]

C. *OTC's Services and Facilities*

38. We turn next to the question of whether OTC operates a telephone exchange service within the meaning of the Communications Act. As our summary of the record indicates, OTC essentially provides channels linking offshore oil platforms, rigs and vessels to onshore local exchange companies. Microwave radio facilities are largely or entirely used to establish the channels, and all switching is done by the onshore telephone companies which also provide the dial tone and assign telephone numbers in their exchanges to OTC. The platforms, rigs, and vessels can and do move, and the OTC facilities are used almost exclusively to send and receive calls through the onshore telephone exchanges. There is little or no "local", *i. e.*, rig-to-rig calling over OTC's facilities. These characteristics represent a specialized operation designed and operated to serve a particular group of industrial customers and do not constitute a local telephone operation.[54]

39. OTC differs from traditional exchange carriers in other ways as well. For example, OTC is not certified by any state as a provider of basic exchange service within a local exchange area. While OTC notes that it has a tariff on file in Louisiana, the PSC has indicated that this tariff does not authorize OTC to provide local exchange service within an exchange or within Louisiana's regulatory jurisdiction.[55] OTC's state tariff authorizes OTC to serve only a single rig in Louisiana's territorial waters; almost all of OTC's services are provided beyond Louisiana's three-mile jurisdictional limit in the Gulf of Mexico;[56] and OTC does not provide service among subscribers located within a single exchange area. Accordingly, OTC's services and facilities differ substantially from those provided by traditional local exchange carriers.

40. In addition, OTC does not provide exchange switching. Indeed, OTC performs no switching whatsoever via its own facilities. OTC's FX subscribers use facilities that terminate in the exchange areas of the connecting carriers, and are assigned exchange numbers designated to the exchanges served by these connecting carriers. Calls made by OTC's subscribers are routed to the connecting carriers where they are switched and then routed to the dialed party. Moreover, data submitted by OTC indicate that there is little rig-to-rig calling among OTC's subscribers, and that, to the extent that rig-to-rig calls are made, they are made on private lines or radio equipment, or they are transmitted to connecting carrier facilities for switching. While OTC argues that some local exchange carriers that participate in NECA do not perform their own switching, OTC does not identify any such carriers nor are we aware of any.

D. *OTC's Customer Base*

41. The usage patterns of OTC's customers do not resemble those typically served by local exchange carriers. Traditionally, local exchange carriers serve communities that include business and residential users. They offer, first of all, a local calling capability that permits a community of interconnected customers to make calls to one another over a switched network. That defines the exchange. In contrast, OTC's subscribers are a limited group of specialized business customers that use dedicated private lines to make long distance calls to and from offshore rigs and platforms.[57] OTC generated no local service revenues in 1984, the only year for which it submitted data concerning revenues. OTC argues that some NECA members serve exchange areas that do not include residential subscribers.[58] This argument, however, overlooks the fact that these carriers operate within a local exchange and generate local service revenues.

E. *Practical Implications*

42. Our conclusion that OTC is not a local exchange company, and therefore not eligible for NECA membership, is consistent with policy considerations which weigh against its request to participate in NECA. The effect of requiring NECA to permit OTC and similar companies to join the NECA pools would be to require member telephone companies to participate in cost and revenue sharing arrangements with OTC and similar companies.[59] OTC acknowledged the extraordinarily high costs involved in providing services to temporary structures in the Gulf.[60] If OTC were included in the NECA CL pool, all, or a substantial portion, of its costs would be allocated as interstate by the separations process. These costs would include those recovered by end user and carrier common line charges and the common line pool.

43. For multi-line business lines, the interstate end user charge is capped at6 per month per line. Per line costs not recovered by this charge are recovered by the carrier common line charge and assessed to long distance carriers who, in turn, pass along this charge to customers as part of long distance rates. For OTC, with its high cost per loop, the effect of NECA participation would be that OTC's customers would pay an end user rate of6 per line, assuming all lines would be treated as multi-line business lines. Thus, unless special rule revisions were adopted to address the unique interstate character of OTC's operation, OTC customers would enjoy a substantial rate reduction; costs currently recovered from rates paid by OTC's customers would be passed along into the CCL pool and the resulting NECA rates. The effect of this arrangement would be that almost all of OTC's costs would be paid by the nation's long distance callers generally.

44. We see no public interest considerations which would justify subsidizing the costs of OTC and its customers. By including costs incurred by OTC and other specialized carriers in NECA pools we would impose upon the general body of ratepayers substantial expenses incurred solely for the benefit of specialized users, a result that would disserve the public interest.

VII. CONCLUSION

45. In sum, the data provided by OTC indicate that OTC differs from traditional local exchange carriers with respect to the services it provides, the facilities it employs, the usage patterns of its customers, and the revenues generated therefrom. In light of these characteristics of OTC's service, we find that OTC does not provide local exchange and exchange access service. If anything, OTC's service appears to resemble a form of resold exchange or endlink service similar to that provided by ancillary radiotelephone, maritime, and cellular carriers.[51] Thus, OTC does not provide telephone exchange service within the meaning of Section 3(r) of the Act or Part 69 of the rules, and is not eligible for NECA membership. Accordingly, we deny OTC's request to join NECA and to participate in the TS and NTS pools administered by the Association.

VIII. ORDERING CLAUSE

46. Accordingly, IT IS ORDERED that the request made by the Offshore Telephone Company to join the National Exchange Carrier Association and to participate in the traffic sensitive and non-traffic sensitive pools administered by NECA is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Data Com is wholly-owned by Core Laboratories, Inc., a subsidiary of Litton, Inc.

[2] By "end-on-end rates" we mean that for each call, OTC and the onshore carrier each assess a separate rate reflecting the service each provides. This contrasts with a "joint rate" under which the customer pays a single rate for the call, and the various carriers who participate in the transmission are compensated by a settlement arrangement.

[3] Prior to the divestiture of the Bell System, AT&T, the Bell Operating Companies (BOCs) and some Independent telephone companies participated in toll sharing arrangements called "division of revenues" and "settlements" for the provision of interstate long distance service. Under these arrangements, services including interstate message telephone service (MTS), wide area telecommunications service (WATS) and intercity private line services were provided by AT&T, the BOCs and the Independents in accord with a uniform schedule of rates based on these carriers' average plant costs. Costs and revenues incurred under these arrangements were pooled and distributed to the participating telephone companies in a manner that permitted each company to recover its expenses and a uniform return on plant investment. The Commission's Separations Manual, which is now codified as 47 C.F.R. Part 67, was used to determine each company's interstate investment and expense.

[4] Section 202(a) proscribes, *inter alia*, unjust or unreasonable discrimination in charges, practices, classification, regulation, facilities or services for, or in connection with, like communications service. The statutory provision further provides for forfeitures in the event that a carrier knowingly and unreasonably engages in such discrimination.

[5] Under Section 201(a) of the Act, this Commission is authorized, upon a public interest finding, to require a carrier to establish physical connections with other carriers and to establish through rates and a division of charges. Absent a public interest finding, no carrier is obliged to establish through rates and a division of charges with another carrier. *See United Tel.*, 54 FCC 2d 289, 290 (1975), *aff'd, United Tel. v. FCC*, 459 F.2d 720 (D.C. Cir. 1977).

[6] OTC claimed that it had made an informal application to join the Association and that this Commission had failed to resolve OTC's informal request.

[7] *See* letters dated December 8, 1986 from Marathon Oil Co., Odeco Oil and Gas Co., and Standard Oil Production Co.; letter dated December 10, 1986 from Texaco USA; and letter dated December 14, 1986 from Texaco USA and CNG Producing Co.

[8] OTC Response at 5-6. OTC states that construction costs for a single microwave radio path are17,500, that a duplex radio path costs about 35,000, and that these additional 78.7 miles of radio facilities are under construction or proposed. OTC does not specify, however, when it plans to begin using these planned radio facilities. *Id.* at 5.

[9] Platforms are artificial islands normally designed for up to 40 years' use. Manned platforms are equipped with sleeping quarters, while unmanned platforms are not. Drilling rigs are temporary fixed structures designed to remain at a single location for periods ranging from 3 days to 6 months. OTC states that, on average, a drilling rig remains at a single location for 45 days.

[10] OTC Response at 2. In direct contrast to these data, OTC submitted data in the complaint proceeding that indicate that in 1975 and 1978, the most recent years for which data were compiled, OTC served 2,323 and 2,075 platforms, respectively. *See* Docket No. 21396, Offshore Exhibit at 1-N, p.2 and Trial Staff Exhibit at 7, p.3. Apparently, OTC has either discontinued service to a substantial number of rigs and platforms or has supplied inaccurate or misleading data. In either event, OTC has failed to provide a breakdown of the number of rigs, platforms and vessels it serves in the Gulf, as requested by the Bureau Letter.

[11] OTC Response at 2.

[12] *Id.* at 14.

[13] In response to Question 1(a) of the Bureau Letter, OTC states that it interconnects with only three connecting carriers. OTC Response at 3. OTC provided a separate, different list of connecting carriers and locations, however, in its response to Question 4 of the Bureau Letter. AT&T observes that this latter, more extensive list of connecting carriers apparently includes carriers with which OTC interconnects through facilities supplied by another telephone company. AT&T Comments at 20.

[14] OTC Response at 1. OTC states that it "does not utilize its own switching equipment in the provision of its communications services because of the nature of the switching arrangements offered by SCB in the Morgan City, Louisiana exchange." *Id.* at 3. In other portions of its response, OTC states that for all calls that originate or terminate on OTC's facilities, switching is performed by connecting carriers. OTC Response at 3, 16.

[15] OTC states that it uses the term "private line" to denote "a single (nonparty) line and the Company's flat monthly basic exchange rate for a telephone connecting to SCB's switch at Morgan City." OTC Response at 24. In its October 23 letter OTC states that its monthly fixed exchange rate for such service is456. October 23 Letter at 3-4.

[16] OTC Tariff F.C.C. No. 2.

[17] OTC's interstate tariff does not define the term "fixed central office station." In Part 22 of the Commission's Rules, however, offshore central stations are defined as "fixed station(s) in the offshore radio service for interconnection with the land telephone system." 47 C.F.R. § 22.2. These facilities form hubs interconnecting OTC facilities on subscribers' offshore drilling sites to OTC's cable.

[18] OTC Tariff F.C.C. No. 2, § H at 28.

[19] *Id.* at 29-30.

[20] Louisiana PSC Letter to Chairman, Federal Communications Commission, at 1-2, dated Jan. 30, 1987. During various times in the past, however, OTC has had a tariff on file in Louisiana authorizing service in the state. OTC's tariff was first accepted for filing by the Louisiana PSC in 1967. According to OTC's testimony, however, OTC implemented service under its state tariff on April 10, 1970, but discontinued this service in 1973. In 1981, OTC asked the Louisiana PSC for authority to reinstate service to a single rig located in the Gulf within Louisiana's territorial waters. Thus, we are unable to determine precisely from the Louisiana PSC's characterization of OTC what that Commission's regulatory treatment of OTC has been.

[21] AT&T Comments at 5-6. In testimony related to the complaint proceeding, AT&T argues that OTC is not a local exchange carrier. AT&T further argues that OTC's own witness affirms that OTC's subscribers had no need for exchange services. *Id.* at 7-8. *See also* Ameritech Comments at 2-3; Bell Atlantic Comments at 1-2. In testimony in the complaint proceeding, Carl Domiano, OTC Vice President, stated that OTC's system was not designed to permit calls between offshore sites and that there was no demand for such service. Instead, he stated, calls between OTC subscribers are routed to adjacent carriers located onshore where they are switched by the adjacent carrier and then routed back offshore to OTC's facilities. *See* Offshore Tel. v. South Central Bell Tel. and AT&T, ENF File No. TS-2-77, Testimony of Carl Domiano, Transcript pps. 519-20, 404, 448. *See also* OTC 1984 Form M, para. 34, p.56; *Offshore Telephone Co.*, 97 FCC 2d 392, 398 (ALJ 1980).

[22] AT&T Comments at 4 n.8. BellSouth argues that OTC is a specialized carrier that provides a communications link at high cost to a single and limited user group of oil producers that operate in the Gulf of Mexico. BellSouth compares OTC's service to ancillary radiotelephone service and notes that such maritime radiotelephone service providers do not participate in NECA pooling arrangements. BellSouth Comments at 1-2.

[23] Apart from its substantive arguments, AT&T argues that OTC has failed to respond adequately to the Bureau's questions. Therefore, AT&T continues, the Bureau is not able to determine the impact of OTC's participation on the NECA pools. AT&T Comments at 17-30. BellSouth agrees that OTC's filings are deficient. It cites OTC's responses to Questions 1, 1(a), 1(c), 3, 4, 5(a), 6(a), 6(c), 7, 8 and 10 as examples of OTC's failure to provide complete or appropriate answers to the Bureau's questions. BellSouth Comments at 4-8.

[24] AT&T Comments at 31.

[25] Ameritech Comments at 2-3.

[26] *Id.* at 3.

[27] Bell Atlantic Comments at 2 n.2.

[28] OTC was classified as a dominant carrier in the Gulf of Mexico in 1982. *See* Offshore Telephone Company, File No. W-P-C-4535, Applications for Section 214 Authorization at 3, 5 (May 12, 1982). This determination of OTC's competitive status was based on competitive conditions that existed in the Gulf in 1982. US West observes, however, that telecommunications service in the Gulf presently is provided competitively by a number of common and private carriers, including Coastal Communications Company and Petroleum Communications, Inc. *See* US West Comments at 3.

[29] *Id.* at 9-10.

[30] US West claims that if OTC were to participate in the NECA pools, up to 75 percent of the costs incurred by OTC subscribers would be paid by the residential and business subscribers of carriers other than OTC. US West argues that this result would impose an unreasonable burden on the ratepaying public and is inconsistent with the purposes of NECA. *Id.* at 6-7, 12-14.

[31] *See* , CNG Letter dated Dec. 4, 1986 at 1; Marathon Letter dated Dec. 8, 1986; Odeco Letter dated Dec. 8, 1986; Standard Oil Letter dated Dec. 8, 1986 at 1; and Texaco USA Letter dated Dec. 10, 1986.

[32] The arguments summarized in this Section appear in OTC's mandamus petition, in its November 14, 1986 response to the Bureau Letter, in its December 15, 1986 supplementary response, and in its complaint.

[33] OTC Mandamus Petition at 7.

[34] *But see infra* para. 35.

[35] *See supra* para. 4.

[36] MTS and WATS Market Structure Inquiry Phase I, Third Report and Order, 93 FCC 2d 241 (1983) (*Access Order*), *modified on recon.*, 97 FCC 2d 682 (1983), *modified on further recon.*, 97 FCC 2d 834 (1984), *affirmed in principal part and remanded in part sub nom., National Ass' n of Regulatory Utility Comm' ners v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1224, 1225 (1985), *modified on further recon.*, 99 FCC 2d 708 (1984), *recon. denied*, 101 FCC 2d 1221 (1985), *further recon. denied*, 102 FCC 2d 849 (1985), *appeal pending sub nom., U. S. Telephone, Inc. v. FCC*, No. 84-1115 (D.C. Cir. Mar. 23, 1984).

[37] *Access Order* at 268.

[38] OTC aknowledges the extraordinarily high costs of providing services to business subscribers that use temporary structures in the Gulf, such as, in OTC's case, oil companies operating drilling rigs and platforms. *See* OTC comments in *Offshore Radio Telecommunications Services*, Docket No. 20368 at paras. 21, 22, and 26.

[39] Initially, the common line (CL) pool was mandatory, while NECA's end user common line (EUCL) and traffic sensitive (TS) pools were voluntary. LECs could choose either to join NECA's TS or EUCL pools, or to file their own tariffs. In practice, the large LECs almost universally file separate tariffs, and the voluntary NECA pool members are almost exclusively small telephone companies. The CL pool will become voluntary beginning in 1989, and we anticipate that large LECs will elect to file individual CL tariffs while small companies are likely to remain in the NECA CL pool.

[40] *Access Order*, 93 FCC 2d at 335. *See also* 47 C.F.R. § 69.601(a).

[41] *Id.*

[42] North Carolina Util. Comm'n v. FCC, 552 F.2d 1036, 1045 Cir. 1976, *cert. denied*, 434 U.S. 874 (1977).

[43] *See* Public Notice, Mimeo No. 4520 (released May 21, 1986).

[44] This Commission has defined a "wireline carrier" as one that provides landline local exchange service. *See* Revision and Update of Part 22 of the Public Mobile Radio Services Rules, Memorandum Order and Opinion, CC Docket No. 80-57, 95 FCC 2d 769, 772 (1982).

[45] Section 214 states, in relevant part: "[N]o such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single state unless such line constitutes part of an interstate line; (2) local, branch, or terminal lines not exceeding ten miles in length." *See also*, Section 2(b) of the Act, 47 U.S.C. § 152(b).

[46] Using AT&T once again as an example, we note that this Comission concluded that AT&T is a dominant carrier in MTS services. *See Competitive Common Carrier Services and Facilities Authorizations*, CC Docket No. 79-252, *Sixth Report and Order*, 99 FCC 2d 1020, (1985); *vacated and remanded*, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). AT&T has not, however, participated in local exchange service since the divestiture of its operating companies.

[47] *See* Offshore Telephone Company, File No. W-P-C-4535, Application for Section 214 Authorization at 1 n.2 (July 20, 1982).

[48] *See* Public Notice, Report No. CL-87-44 (released Nov. 6, 1986). Frequency Block B frequencies are those reserved for wireline carriers.

[49] *See The Offshore Telephone Company*, Memorandum Opinion and Order, 2 FCC Rcd 4575 (1987).

[50] *Id.*

[51] With respect to OTC's use of rural radio and Telephone Maintenance Radio Service frequencies, we note that under the Commission's procedures for processing applications for such use, the Commission relied on certifications made by the applicant, unless such certifications raised questions on their face or questions were raised by other parties. Thus, the Commission's grants of the applications are not premised upon any determination of Offshore's eligibility. *See* 47 U.S.C. § 312(a)(1) and (2). Regardless of any representations made by Offshore in its radio applications, we note that the Commission has since eliminated the wireline restriction on the frequencies assigned to Offshore. Elimination of Separate Frequency Allocation Structure, 99 FCC 2d 311 (1984).

[52] Offshore Telephone F.C.C. Tariff No. 2, Trans. No. 34 (filed March 27, 1987).

[53] We note, in addition, that OTC's request to be treated as a local exchange carrier contains an implied concession that the Commission has never made a formal determination with respect to its status. *See also* Letter from Chief, Tariff Division, to Robert Healy, Counsel, OTC, dated Apr. 10, 1985.

[54] A decision to include OTC in NECA could prompt a deluge of NECA applications from specialized providers. OTC observes that NECA's membership includes carriers that serve high cost regions located in Florida, the Grand Canyon and the Alaska bush. These situations are not before us, and were apparently included in traditional, pre-access settlement arrangements in accordance with carrier-to-carrier agreements permitted under the Act, 47 U.S.C. §§ 201(a), 211. Moreover, in *Offshore Telephone Co. v. South Central Bell Telephone Co.*, 2 FCC Rcd 4546, 4556 (1987), we stated that although OTC shares some characteristics of certain carriers that were included in the toll pool, it is unlike pool members in terms of its user characteristics, as well as the fact that it does not provide exchange service. Indeed, OTC shares far more service characteristics with other services that were excluded from the toll pool. The record revealed that other services that were end-link in nature or geared to a limited clientele, such as mobile, air-to-ground, maritime, and services to oil and gas rigs, were excluded from nationwide averaged rates and toll settlements, regardless of whether such services were provided by local exchange carriers or by carriers of a more limited or specialized nature. Id.

[55] See supra n.19 and accompanying text.

[56] In the materials submitted in the complaint proceeding, OTC indicated that it provided no intrastate services between 1973 and 1980, but that in 1981, it provided service terminating at one subscriber location situated within the territorial waters of Louisiana. In materials it submitted in response to the Bureau Letter, however, OTC does not state whether that subscriber's facilities still exist in that location or whether OTC continues to provide this service.

[57] In the Bureau Letter, OTC was asked to detail its subscribers' calling patterns and indicate the number of rig-to-rig calls placed by subscribers. OTC has not provided this information. In its response, however, OTC indicates that an extensive number of interplatform calls do occur. OTC states further that it was unable to quantify these calls because all local calling is switched by SCB at Morgan City. OTC Response at 23.

[58] OTC asserts that some Independent companies contract out a portion of their switching, OTC Brief at 36 (Sept. 12, 1986), and argues that several exchanges located in Southern Bell's urban service areas are examples of exchanges that serve business users and have no residential subscribers. See Letter to Secretary, Federal Communications Commission, from Robert W. Healy, Counsel, OTC, dated Mar. 10, 1987.

[59] OTC did not provide data that demonstrate the effect of its participation on the NECA NTS and TS pools, stating instead that it is unable to derive such data until it determines the effect of jurisdictional separations procedures on OTC's costs and revenues.

[60] In its complaint proceeding, OTC stated that its high costs are attributable, in part, to the difficulty and expense of contracting technicians to repair losses that result from frequent storm conditions in the Gulf. See OTC Comments in Offshore Radio Telecommunications Services, Docket No. 20368 at paras. 21, 22 and 26. To further illustrate OTC's high costs, AT&T points to Domiano's testimony introduced in the complaint proceeding that indicates that the ratio between OTC's average telephone plant investment per line and the lowest cost LEC telephone plant investment per line is 87 to 1. The ratio between the highest and lowest cost LECs' telephone plant investment per line is about 5 to 1. See AT&T Comments at 13.

[61] We note further that revenues generated by services such as radiotelephone, maritime, cellular, and land mobile, traditionally were excluded from nationwide rates and toll settlement arrangements and are excluded from NECA pools, even in instances in which these services are provided by traditional local exchange carriers. OTC services in reality appear to fall squarely within the separate category of mobile services as defined in Section 3(n) of the Act: "a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicatingamong themselves and includes both one-way and two-way radio communication services." In fact, OTC's only station uses microwave spectrum allocated to it for Domestic Public Land Mobile Radio service.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-324

In re Applications of

KENNEBEC VALLEY TELEVISION, INC.	File No. BPCT-850724KH
SEBAGO BROADCASTING COMPANY, INC.	File No. BPCT-850725KW

For Construction Permit for
New Television Station at
Lewiston, Maine

MEMORANDUM OPINION AND ORDER

Adopted: July 11, 1988; Released: July 20, 1988

By the Commission:

1. This proceeding involves two mutually exclusive applications for authority to construct a new UHF television broadcast station on Channel 35 at Lewiston, Maine. The applications of Kennebec Valley Television, Inc. and Sebago Broadcasting Company, Inc. were designated for hearing in *Hearing Designation Order* (*HDO*), 50 Fed. Reg. 47109 (Nov. 14, 1985). In the initial decision, FCC 86D-53 (Aug. 22, 1986), Administrative Law Judge Edward J. Khulmann determined that Kennebec was the comparatively superior applicant because Kennebec's slight media diversification and moderate comparative coverage preferences outweighed Sebago's moderate ownership integration preference. The Review Board upheld the initial decision, but it increased Kennebec's comparative coverage preference from moderate to moderate-to-substantial. *Kennebec Valley Television, Inc.*, 2 FCC Rcd 1240 (Rev. Bd. 1987).

2. Both applicants have appealed the Board's decision. Now before the Commission are the following: (1) Application for Review of Sebago Broadcasting Company, Inc., filed March 30, 1987; (2) Contingent Application for Review, filed March30, 1987 by Kennebec (3) Mass Media Bureau's Comments on Application for Review of Sebago Broadcasting Company, Inc., filed April 14, 1987; (4) Opposition to Application for Review of Sebago Broadcasting Company, Inc., filed April 14, 1987 by Kennebec; and (5) Opposition of Sebago Broadcasting Company, Inc. to Contingent Application for Review by Kennebec Valley Television, Inc., filed April 14, 1987.

3. We agree with the Board's disposition of this comparative proceeding and deny review of its decision. We take the opportunity, however, to discuss the contentions of the parties regarding the propriety of certain actions by the Mass Media Bureau in issuing the *HDO* in this proceeding. We find, for the reasons which follow, that Commission review is here appropriate.

4. The B cutoff date in a comparative licensing proceeding is the date after which applicants' comparative proposals are frozen and amendments thereto are no longer permitted as of right. In this case, the B cutoff date was Friday, September 13. 1985. On Monday, September 16, 1985, the Commission received an amendment to Sebago's application specifying changes in its ownership structure and the broadcast interests of its principals. The Commission accepted the amendment for reporting purposes but not for comparative purposes. That is, any comparative benefits that normally would have accrued to Sebago as a result of filing such an amendment would have been an improper upgrading and, therefore, the amendment was not accepted for consideration in the comparative evaluation of the applicant. See *HDO*, 50 Fed. Reg. at 47110 n.1. Sebago appeals that ruling pursuant to 47 C.F.R. §§ 1.106 and 1.115, contending that the Commission's acceptance of the amendment only for reporting purposes was error.

5. In its application as originally filed, Sebago reported that it was a corporate applicant with three equal voting stockholders: Jeffrey S. Hoops, 33.3 percent (President, Treasurer, and Director); Garry Spire, 33.3 percent (Secretary and Director); and Lawrence Rogow, 33.3 percent (Director). Sebago also reported that Spire and Rogow held other media interests. After the corporate revision as reported in the amendment, Sebago became -- as it is now -- a two-tiered ownership structure with Hoops owning 100 percent of the voting stock, Rogow owning 100 percent of the non-voting stock, and Spire no longer holding any interest in the corporation. According to Sebago, if its amendment were given comparative consideration in this proceeding, Sebago would be the winning applicant. [1]

ARGUMENT

6. Sebago claims that *Caldwell Television Associates, Ltd.*, 94 FCC 2d 69, recon. *denied, FCC 83-462 (1983), requires the Commission to accept Sebago's amendment for comparative purposes.* [2] *In Caldwell,* the Commission found that circumstances beyond the applicant's control warranted accepting a late-filed application. The unforeseeable circumstances were severe weather conditions in another part of the country, which delayed delivery of the application. Sebago claims that *Caldwell* stands for the proposition that if, after an applicant delivers its application to an overnight courier service in sufficient time for the courier to forward the application to the Commission under normal circumstances, unanticipated weather conditions cause a delay, then the applicant has exercised reasonable diligence to assure timely delivery of its application and should be excused for making a late filing. In *Caldwell,* the Commission in fact accepted the application for filing even though it was filed one day late. Similarly, Sebago argues that, in *Wright County Broadcasting Co.*, 13 RR 2d 1251 (1968), and *Pictronics, Inc.*, 32 FCC 2d 325 (1971), the Commission indicated that it would waive its cut-off rules if the late filing was due to circumstances beyond the applicant's control. Sebago contends, for the reasons which follow, that such circumstances exist here.

7. Sebago has attached to its application for review the affidavits of Lawrence Rogow and of Steve Robbins, Sebago's agent. For the sake of argument, we will assume that the following facts asserted in those affidavits are true. Rogow regularly and successfully uses the Express Mail overnight services of the United States Postal Service. On September 12, 1985, Rogow instructed Robbins to deliver the amendment to the Express Mail terminal of the Santa Monica branch of the Postal Service for delivery to the Commission by 3:00 p.m. on September13, 1985. Rogow did not find out about the late delivery of the amendment until he received a copy of the *HDO* on November 11, 1985. Rogow's affidavit does not state whether Rogow instructed Robbins to secure proof of receipt from the Postal Service, nor does Robbins' affidavit state whether Robbins purchased proof of receipt when mailing the amendment. Rogow also says that he has not received a satisfactory explanation from the Postal Service of why it failed to deliver the amendment in a timely manner. In his affidavit, Robbins states:

> Because I was aware that it was nearing the time that Express Mail packages would not be accepted for next-day delivery from that branch of the U.S. Postal Service, prior to handing the package to the postal worker I asked him if it would be delivered the next day. I had been instructed by Lawrence Rogow to instead deliver the package to the Express Mail counter of the Worldway Terminal of the U.S. Postal Service if the Santa Monica Branch would not accept the package for next day delivery. The Worldway Terminal accepts Express Mail packages for next day delivery for two more hours daily beyond the cutoff time of the Santa Monica Branch. Because the postal worker told me that the package would be delivered the next day, I handed him the package.

Application for Review, Attachment C. Sebago also submitted a copy of the Express Mail customer receipt with the application for review. Although the date on the receipt is obscured, for the purposes of our discussion here we will assume that it was dated September 12, 1985.

8. Sebago argues that the facts in this case are virtually identical to those in *Caldwell* – except that in *Caldwell* fog in mid-February at an intermediate stop on the courier's air route was the cause of the delay. Sebago contends that it cannot reasonably be argued that the fog in a distant city on a winter day was less foreseeable to the applicant in *Caldwell* than was the unknown failure of the Postal Service's delivery system when Sebago sent its amendment from Santa Monica, California on a summer day in September 1985. Sebago therefore concludes that the differences between Segabo's experiences with a courier service and the experiences of the applicant in *Caldwell* are not ones that can support a rational explanation for treating Sebago more harshly than the applicant in *Caldwell*.

9. Although Sebago acknowledges that review of the Commission's refusal to accept its amendment for comparative purposes had to wait until applications for review of the final Review Board decision in the case were filed, it nevertheless raised the matter before both the ALJ and the Board. Both rejected Sebago's argument. The Board, noting the decisional significance of the amendment, "tentatively" determined that Sebago's amendment was properly treated below and refused to certify the matter to the Commission. 2 FCC Rcd at 1240 ¶ 3. The Mass Media Bureau supports this conclusion. However, it believes that Sebago should have presented its arguments contesting this aspect of the *HDO* in a timely petition for reconsideration of that ruling. Like the Bureau, Kennebec believes that Sebago has not preserved its right of appeal because it failed to seek reconsideration. Moreover, Kennebec asserts that applying *Caldwell* to Sebago's situation would unfairly prejudice applicants (such as Kennebec) who are ready, willing, and able to construct.

DISCUSSION

10. We reject the contentions that Sebago has failed to preserve its right to appeal because it did not request reconsideration of the *HDO*. Under 47 C.F.R. § 1.115(e)(3), appeals from actions taken in a hearing designation order issued under delegated authority "shall be deferred until applications for review of the final Review Board Decision in the case are filed." This rule is clarified by 47 C.F.R. § 1.106(a)(1), which stipulates that a petition for reconsideration of a hearing designation order "will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding." Sebago's participation in the proceeding is not in issue here; its request for review of the *HDO*, therefore, was not appropriate earlier. Thus, we turn to the substance of Sebago's application for review.

11. Sebago's reliance on *Caldwell* is misplaced and we will reject its appeal. Although Sebago contends that its factual situation and that of the applicant in *Caldwell* are virtually identical, it misses the important distinction that Sebago was forwarned not to rely on courier service "guarantees," whereas the *Caldwell* applicant was not.

12. The *Caldwell* decision was released in June 1983, more than 15 months before the events in the instant case. *Caldwell* contained a specific admonishment to all future applicants concerning delivery services. The Commission warned applicants not to rely on "guarantees" of courier services to meet our deadlines:

> We wish to take this opportunity to reaffirmour intent to continue to enforce strictly thecut-off provisions of our rules and expect allapplicants and their counsel to adhere thereto.The rules afford all parties, be they located inWashington, D. C., or elsewhere, adequate timeto submit their applications, amendments, andpleadings in a timely manner. We caution partieswho wait until the last possible day to effectdelivery of their submissions from out-of-town,based on the "guarantees" of all courier servicesthat they run a considerable risk that delays indelivery will render their filings untimely. *Absent unusual and compelling circumstances, aparty's sole reliance upon the "guarantee" ofthese organizations would be misplaced andwould not excuse the consequences of its untimely filings.*

94 FCC 2d at 70-71 (emphasis added).

13. In *Green Country Mobilphone, Inc. v. FCC*, 765 F.2d 235 (1985), the court stressed that the Commission must rely on a reasonable distinction when it treats purportedly similar situations in different ways. *Green Country* involved the application of cutoff rules in the cellular radio service. Certain applicants were barred from filing applications on November 8, 1982, because they arrived at the Commission – at most – a few minutes late. Appellants

claimed that they were late because of the breakdown of commercial duplicating equipment. The Commission refused to accept the applications. The court reversed the Commission, not because the strict rule it applied was inherently invalid, "but rather because the Commission has invoked the rule inconsistently." *Id.* at 237. It was conceded that the Commission has discretion to apply a strict deadline. However,

> once an agency agrees to allow exceptionsto a rule, it must provide a rationalexplanation if it later refuses to allowexceptions in cases that appear similar. A"sometimes-yes, sometimes-no, sometimes-maybe policy of [deadlines] cannot . . . besquared with our obligation to precludearbitrary and caprious management of [anagency's] mandate.

Id. (citing *NLRB v. Washington Star Co.*, 732 F.2d 974, 977 (D.C. Cir. 1984)). The court determined that the Commission's refusal to accept applications tendered two or three minutes late appeared inconsistent with the decision in *Caldwell* to accept an application that arrived one day late. The court could find "no principled distinction between the two causes of delay." *Id.* at 238.

14. On October 4, 1985, as a result of the court's decision in *Green Country,* the Commission took the opportunity (as suggested to it by the court) to state that in the future only truly extraordinary circumstances -- such as a debilitating earthquake or city-wide power outage which brings transportation to a halt -- would be sufficient to permit a waiver of a filing dseadline for a broadcast applicant and that the Commission would follow a policy of strictly adhering to the cutoff rules. See *Public Notice,* FCC 85-534, 58 RR 2d 1706 (1985). The Commission made it clear once again, that claims of delays caused by delivery services are not unusual or compelling circumstances. *Id.*

15. Contrary to our separate admonition in *Caldwell,* issued before the events in this case occurred, Sebago has not been able to demonstrate "unusual or compelling circumstances" or that the tardiness was attributable to circumstances completely beyond its control. Sebago merely relied on a guarantee of next-day delivery. As we warned applicants in *Caldwell,* such reliance standing alone does not excuse an untimely filing. Unlike the applicants in *Green Country* (and *Caldwell),* the Commission had clearly warned applicants such as Sebago not to simply rely on the "guarantee" of a courier service. Sebago relied on the "guarantee" and it must now face theUnlike the applicants in *Green Country* (and *Caldwell),* the Commission had clearly warned applicants such as Sebago not to simply rely on the "guarantee" of a courier service. Sebago relied on the "guarantee" and it must now face the consequences of its chosen course of action. Accordingly, we affirm the *HDO* 's determination accepting Sebago's September 16, 1985 amendment for reporting purposes, but not for comparative purposes.

16. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed March 30, 1987 by Sebago Broadcasting Company, Inc. IS GRANTED to the extent indicated herein and IS DENIED in all other respects; and the Application for Review filed March30, 1987, by Kennebec Valley Television, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Kennebec claims that even after the date of the amendment, Spire and Rogow continued to participate in the operation of Sebago. For the reasons set forth below, it is not necessary for the Commission to address these allegations.

[2] The holding in *Caldwell* has since been overruled. See ¶ 14.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

RCA Global Communications, Inc. — Transmittal Nos. 5257 and 5272

Tariff F.C.C. No. 107

ORDER

Adopted: June 29, 1988 ; Released: June 30, 1988

By the Chief, Common Carrier Bureau:

1. On November 16, 1987, RCA Global Communications, Inc. (RCA Globcom) filed Transmittal No. 5257, proposing to establish rates and regulations for satellite earth station services from Guam to overseas points. Services are currently provided by the Earth Station Ownership Consortium (ESOC), which includes RCA Globcom, MCI International, Inc. (MCII), and Comsat International Communications, Inc. (CICI).[1] RCA Globcom filed its proposed tariff in conjunction with its intended acquisition of the rights of CICI and MCII in the Pulantat, Guam, international earth station.[2] In its letter of transmittal, RCA Globcom states that since its proposed charges for service from Guam are based on the costs of maintaining that station on a stand-alone basis, its proposed rates "represent an increase from CICI's averaged charges for service from all ESOC earth stations." RCA Globcom Transmittal No. 5257 at 1. RCA Globcom's proposal is scheduled to take effect on July 1, 1988.

2. ITT World Communications, Inc. (ITT Worldcom) filed a petition to suspend and investigate Transmittal No. 5257. [3] IT&E Overseas, Inc. (IT&E) and the Pacific Connection, Inc. (PCI) filed petitions to reject, accompanied by motions for acceptance of late-filed petitions.[4] RCA Globcom filed an opposition to PCI's motion to accept a late-filed pleading,[5] as well as replies to the petitions of ITT Worldcom, IT&E, and PCI.[6]

3. Based on RCA Globcom's cost allocation methodology, all of its proposed increases are in the voice-grade service category. ITT Worldcom and IT&E, however, argue that RCA Globcom has failed to justify its decision to load all cost increases into voice-grade rates. ITT Worldcom Petition at 2-3; IT&E Petition at 6-11. Acccording to ITT Worldcom, the voice-grade rate increases are intended to drive competition from the market and are not supported by sufficient cost data. ITT Worldcom Petition at 2. IT&E contends that under RCA Globcom's proposed rates, voice-grade customers are likely to subsidize high speed data service. IT&E Petition at 6-7.

4. RCA Globcom replies that its cost support information is more than sufficient to justify the proposed voice-grade rates. RCA Globcom Reply (ITT Worldcom) at 4. RCA Globcom asserts that since the earth station is to be used almost entirely for voice-grade services, it would be impossible to avoid having some voice-grade users bear necessary cost increases. *Id.* at 7.

5. On June 14, 1988, RCA Globcom filed further revisions to its proposed tariff under Transmittal No. 5272. In this transmittal, RCA Globcom, *inter alia*, submitted revised cost support data at the request of Commission staff. According to RCA Globcom, it has revised its method for allocating expenses to all of its current service categories. Consequently, RCA Globcom states, the proposed monthly recurring charge for voice-grade service has been reduced by approximately 3 percent, and its charges for high speed data and occasional television service have been increased by approximately 45 to 50 percent. *See* RCA Globcom Transmittal No. 5272 at 1. IT&E has filed a petition to reject or suspend Transmittal No. 5272,[7] and MCI Communications Corporation, on behalf of its affiliate, RCA Globcom, has replied.[8]

6. IT&E generally argues that RCA Globcom's revised cost support data fail to comply with the requirements of Section 61.38 of the Commission's Rules and do not justify the rates proposed. IT&E Petition at 4. According to IT&E, RCA Globcom's proposed increase in the rate for voice-grade service is still of sufficient magnitude to "effectively [deny] IT&E equitable earth station access." *Id.* at 3. MCI replies that IT&E has again failed to justify its argument that IT&E and other competitors of RCA Globcom should be provided earth station facilities at marginal cost. MCI Reply at 7.

7. The Common Carrier Bureau has reviewed RCA Globcom's initial filing, the revised filing, and the various pleadings. We find that no compelling argument has been presented that the proposed tariff revisions are so patently unlawful as to require rejection, and that an investigation of the revisions is not warranted at this time.

8. Accordingly, IT IS ORDERED that the petitions filed against RCA Global Communications, Inc. Tariff F.C.C. No. 107, Transmittal Nos. 5257 and 5272, by ITT World Communications, Inc. and IT&E Overseas, Inc., ARE DENIED.

9. IT IS FURTHER ORDERED that the motion to accept a late-filed pleading filed by the Pacific Connection, Inc. IS DENIED and its petition to reject IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Services are offered pursuant to CICI Tariff F.C.C. No. 1, Multi-Purpose Earth Segment Service.

[2] On May 16, 1988, the Common Carrier Bureau released an Order granting RCA Globcom's application under Section 214 of the Communications Act for authority to acquire and operate the interests of CICI and MCII in the Pulantat, Guam, earth station. *See* RCA Global Communications, Inc., *et al.*, Memorandum Opinion, Order and Authorization, DA 88-701, released May 16, 1988.

[3] ITT Worldcom Petition for Suspension and Investigation, filed Dec. 1, 1987 (ITT Worldcom Petition).

[4] IT&E Petition To Reject, filed Dec. 8, 1987 (IT&E Petition); PCI Petition To Reject, filed Dec. 18, 1987 (PCI Petition). In view of IT&E's seven-day late filing because of delays resulting from the distance and time zone differences between Guam and the United States, we conclude that IT&E's late filing was justified and we grant its motion. However, because we conclude that PCI has failed to justify its 17-day late filing on the ground that its president and chairman was out of Guam and could not be reached until after the filing deadline had passed, we deny its motion and dismiss PCI's petition to reject as untimely.

[5] RCA Globcom Opposition to Motion To Accept Late-Filed Pleading, filed Dec. 31, 1987 (RCA Globcom Opposition).

[6] RCA Globcom Reply to ITT Worldcom Petition for Suspension and Investigation, filed, Dec. 11, 1987; RCA Globcom Reply to IT&E Petition To Reject, filed Dec. 18, 1987; RCA Globcom Reply to PCI Petition To Reject, filed Dec. 31, 1987.

[7] IT&E Petition To Reject or Suspend, filed June 24, 1988 (IT&E Petition II). The Bureau found good cause to grant IT&E a three-day extension of time to file its petition on the ground that service of the revised tariff was delayed. *See* RCA Global Communications, Inc., Tariff F.C.C. No. 107, Transmittal Nos. 5257 and 5272, Order, DA 88-939, released June 21, 1988.

[8] MCI Communications Corporation Reply, filed June 27, 1988 (MCI Reply). MCI Communications Corporation acquired RCA Globcom on May 16, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-287

In the Matter of

SOUTHWESTERN BELL
TELEPHONE
COMPANY

Transmittal No. 1629
Revisions to Tariff F.C.C. No. 68

ORDER

Adopted: June 30, 1988; Released: July 1, 1988

By the Chief, Common Carrier Bureau:

1. On June 3, 1988, the Bureau released a Memorandum Opinion and Order suspending the proposed tariff revisions of Southwestern Bell Telephone Company (SWB) in Transmittal No. 1629, and designating certain issues for investigation.[1] The *Investigation Order* is the subject of an application for extension of time and a petition for reconsideration, both filed by SWB on June 27, 1987.

2. The *Investigation Order* required SWB to file a direct case in response to the issues designated for investigation by July 5, 1988. SWB requests that the time for complying with this requirement be delayed indefinitely to give the Bureau sufficient time to consider the petition for reconsideration, and states that granting the relief requested in the petition for reconsideration could alter or limit the scope of the investigation.[2] In addition, SWB asserts that a response to some of the issues designated in the *Investigation Order* will require a significant commitment of personnel and funding, and the time required to perform the necessary tasks is in excess of the one month allowed in the *Investigation Order*. [3]

3. In light of the concerns expressed by SWB, we have concluded that a revision in the pleading cycle established in this investigation is warranted. After completing a more thorough assessment of the arguments presented by SWB, as well as any arguments and other considerations which may be raised by other interested parties, we will establish a revised due date for the direct case and other pleadings in a subsequent Order.

4. Accordingly, IT IS ORDERED that the application for an extension of time of Southwestern Bell Telphone Company IS GRANTED, and that its direct case need not be filed until required by the Bureau in a subsequent Order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Southwestern Bell Telephone Company, Revisions to Tariff F.C.C. No. 68, CC Docket No. 88-287, Memorandum Opinion and Order, DA 88-858, released June 3, 1988 (*Investigation Order*).

[2] SWB Application for Extension of Time at 1-2, 4, 5.

[3] *Id.* at 1, 3.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

Southwestern Bell Telephone Company	Transmittal Nos. 1662 and 1663
Revisions to Tariff F.C.C. Nos. 68 and 69	
Ameritech Services	Transmittal No. 188
Revisions to Tariff F.C.C. No. 2	
Cincinnati Bell	Transmittal No. 495
Revisions to Tariff F.C.C. No. 35	
Pacific Bell	Transmittal No. 1357
Revisions to Tariff F.C.C. No. 129	

ORDER

Adopted: July 6, 1988 ; Released: July 7, 1988

By the Chief, Common Carrier Bureau:

1. By the above-referenced transmittals, various local exchange carriers (LECs) have proposed revisions to their tariffs for access services to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity DS3 offerings.[1] The revisions are scheduled to become effective on dates ranging from July 8, 1988, to August 1, 1988.[2]

2. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of LECs' proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings, and establishing a pleading cycle. [3] The above-referenced transmittals raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the instant transmittals will be subject to the outcome of that investigation. We also grant the LECs listed above special permission to advance the effective dates of these transmittals.

3. Accordingly, IT IS ORDERED that Southwestern Bell Telephone Company, Tariff F.C.C. Nos. 68 and 69, Transmittal Nos. 1662 and 1663, Ameritech Services, Tariff F.C.C. No. 2, Transmittal No. 188, Cincinnati Bell, Tariff F.C.C. No. 35, Transmittal No. 495, and Pacific Bell, Tariff F.C.C. No. 129, Transmittal No. 1357, are subject to the investigation instituted in CC Docket No. 88-136.

4. IT IS FURTHER ORDERED that the local exchange carriers listed in paragraph 3, *supra*, may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 88-302.

5. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

6. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, all local exchange carriers subject to this investigation shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for DS3 services which are the subject of such investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] We note that while the LECs' filings also propose ICB rates for other services, this Order deals only with the proposed ICB rates for DS3 and DS3-equivalent services.

[2] No petitions have been filed to reject, suspend, or investigate any of these transmittals.

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (1988) (*Designation Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning
Rates for Dominant Carriers

ORDER

Adopted: July 14, 1988; Released: July 14, 1988

By the Chief, Common Carrier Bureau:

1. On July 1, 1988, the National Association of Regulatory Utility Commissioners (NARUC) filed a motion requesting an extension of the pleading cycle established in the Further Notice in the above-captioned proceeding.[1] At present, comments are due on July 26, 1988, and reply comments on August 26, 1988. NARUC requests that we extend the time for filing comments by 30 days.

2. NARUC asserts that the issues raised by the Further Notice are complex, and require additional time for adequate assimilation and analysis. In addition, NARUC states that its organizational scheme permits only infrequent meetings of its policy-making bodies, and that those meetings will not be concluded until after the July 26 comment due date. NARUC concludes that the Commission has proposed a fundamental change in the regulation of the American Telephone and Telegraph Company and other dominant carriers, and that this proposal merits more time for consideration.

3. It is the policy of the Commission that extensions of time shall not be routinely granted.[2] We think it particularly important that the issues raised in this proceeding be resolved expeditiously as the potential for significant increases in consumer welfare is great. We believe that the current pleading cycle permits parties sufficient time to prepare comments and reply comments based on a considered analysis of the record, and we therefore deny NARUC's motion for extension of time.

4. At the same time, we are sensitive to NARUC's unique circumstances and we anticipate that NARUC's comments regarding the Commission's proposal will be a valuable part of the record. Therefore, absent any demonstrable prejudice to any other party, we would expect to look favorably on a motion by NARUC to accept late-filed comments if such a motion becomes necessary due to the special circumstances related in NARUC's pending motion.

5. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, 47 U.S.C. §§ 154(j), 155(c), and the authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, that the motion of the National Association of Regulatory Utility Commissioners, described in paragraph 1 above, IS DENIED. Comments in this proceeding are due on or before **July 26, 1988,** and reply comments are due on or before **August 26, 1988.**

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Further Notice of Proposed Rule Making, FCC 88-172 (released May 23, 1988).

[2] Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

Southwestern Bell Telephone Company — Transmittal No. 1667

Revisions to Tariff F.C.C. No. 68

GTE Telephone Operating Companies — Transmittal No. 410

Revisions to Tariff F.C.C. No. 1

Pacific Bell — Transmittal No. 1358

Revisions to Tariff F.C.C. No. 128

ORDER

Adopted: July 7, 1988; Released: July 11, 1988

By the Chief, Common Carrier Bureau:

1. By the above-referenced transmittals, various local exchange carriers (LECs) have proposed revisions to their tariffs for access services to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity DS3 offerings.[1] The revisions are scheduled to become effective on dates ranging from July 26, 1988, to August 5, 1988.[2]

2. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of LECs' proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings, and establishing a pleading cycle. [3] The above-referenced transmittals raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the instant transmittals will be subject to the outcome of that investigation. We also grant the LECs listed above special permission to advance the effective dates of these transmittals.

3. Accordingly, IT IS ORDERED that Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal No. 1667, GTE Telephone Operating Companies, Tariff F.C.C. No. 1, Transmittal No. 410, and Pacific Bell, Tariff F.C.C. No. 128, Transmittal No. 1358, are subject to the investigation instituted in CC Docket No. 88-136.

4. IT IS FURTHER ORDERED that the local exchange carriers listed in paragraph 3, *supra*, may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 88-303.

5. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

6. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, all local exchange carriers subject to this investigation shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for DS3 services which are the subject of such investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] We note that while the LECs' filings also propose ICB rates for other services, this Order deals only with the proposed ICB rates for DS3 and DS3-equivalent services.

[2] No petitions have been filed to reject, suspend, or investigate any of these transmittals.

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (1988) (*Designation Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

GREEN BAY CELLTELCO — File No. 00667-CL-MP-88

Request for authorization for a major modification to Station KNKA525

and

Request for Special Temporary Authority to implement major modification in the Domestic Public Cellular Radio Telecommunications operating frequency Block A in the Green Bay, Wisconsin Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted: July 14, 1988; Released: July 22, 1988

By the Chief, Mobile Services Division:

1. Brown County MSA Cellular Limited Partnership (BCLP) has filed (1) a Petition to Reconsider Grant of Special Temporary Authority and Informal Request to Revoke License (*Petition to Reconsider*) of the Special Temporary Authority (STA) granted by the Mobile Services Division (MSD) to Green Bay CellTelCo (Green Bay CTC); and (2) a Petition to Dismiss or Deny (*Petition to Dismiss)* Green Bay CTC's underlying application, in the captioned proceeding. Green Bay CTC filed a consolidated opposition to the *Petition to Reconsider* and *Petition to Dismiss*, and BCLP has filed a reply to the consolidated opposition.[1]

BACKGROUND

2. BCLP is the wireline licensee and Green Bay CTC is the non-wireline licensee in Brown County, the only county in the Green Bay MSA. On February 8, 1988, Green Bay CTC filed an application (FCC Form 401) seeking a major modification of its system to modify a cell at DePere, WI, to increase effective radiated power (modification application). On March 2, 1988, Green Bay CTC filed a letter requesting an STA to operate the facilities proposed in its modifications application. In support of its request, Green Bay CTC states that it was providing relatively circumscribed signal coverage to Green Bay and its modification application would remedy this situation, and the Red Cross was "planning a major, comprehensive disaster simulation exercise . . . in March and April" and had requested Green Bay CTC to participate in these exercises.[2] On March 8, 1988, the MSD granted the STA request until May 24, 1988. [3]

CONTENTIONS OF THE PARTIES

3. BCLP argues that the *STA grant* issued pursuant to Section 22.25(b)(4) of the Commission's Rules was improperly granted because no "extraordinary circumstances" existed in Brown County, and the Commission did not make such a finding.[4] BCLP contends that due to the competitiveness of the cellular industry and in order to avoid the processing delay of the modification application, Green Bay CTC filed its STA request but that Green Bay CTC intentionally misled the Commission into believing that there was an urgent need for an STA grant to Green Bay CTC based on the Red Cross letter. In support of its misrepresentation assertion, BCLP contends that the Red Cross letter: (a) brings into question the real party-in-interest behind the Green Bay non-wireline system (based on the addressee of the letter);[5] (b) does not indicate that the Red Cross either wanted or needed the Commission to act on an emergency basis; (c) does not indicate the timing of the disaster simulation to be held in Brown County and, thus, is merely supportive of Green Bay's efforts to initiate cellular service and not as a Red Cross request to expedite processing of the modification application;[6] and (d) fails to show that Green Bay CTC's existing system is inadequate and cannot be used to justify "extraordinary circumstances" needed to obtain an STA under Section 22.25(b)(4). BCLP asserts that the *STA grant* has set a precedent that disaster simulations are adequate to support the extraordinary relief granted by an STA and, thus, it will make it easier for cellular service providers to obtain significant increases in coverage/service areas without waiting for their applications to be properly processed. Consequently, BCLP says that the Commission will either have to grant all such STA requests or will have to decide which disaster simulations sufficiently affect the public interest. BCLP also asserts that denying the STA request would not have "seriously prejudiced" the public interest because the disaster simulation is only a mock event. Moreover, BCLP adds that it, too, is capable of providing service to the Red Cross.

4. BCLP additionally argues that the engineering in the modification application underlying the STA request is defective because the antenna pattern does not comply with Section 22.15(j)(4) of the Commission's Rules.[7] BCLP further argues that Green Bay CTC failed to supply underlying calculations for the line gain/loss information required for it to independently verify the effective radiated power (ERP) from the antenna. BCLP further asserts that in light of Green Bay CTC's attempt to mislead the Commission into believing that some sort of "extraordinary circumstances" exist warranting grant of an STA, such fact raises the question whether Green Bay CTC possesses the required character qualifications to be a Commission licensee. Moreover, BCLP contends that an additional reason requiring consideration of Green Bay CTC's lack of requisite character is Green Bay CTC's failure to follow explicit conditions contained in its construction permit because it has apparently violated the Communications Act by operating an unlicensed station.[8]

5. In its consolidated opposition, Green Bay STC asserts that the *STA grant* was completely justified and is serving the public interest. According to Green Bay CTC, it had been engaged for some time in discussions with the Red Cross about cellular technology uses and that that Green Bay CTC is the only cellular system in the region not subject to disruption during disaster situations because it does not rely on landlines for interconnection of its cel-

lular system. Green Bay CTC states that it and the Red Cross were aware of the company's operating in a low powered, interim configuration not intended to be the permanent one for the cellular system and, thus, Green Bay CTC requested a Red Cross confirmation letter to seek Commission authority to go to full power to make the Red Cross exercise useful. Green Bay CTC contends that a March 19 Red Cross disaster simulation drill that took place could not have occurred without the *STA grant*. Green Bay CTC argues that the Red Cross letter makes clear that Green Bay CTC is a unique entity in the area vis-a-vis reliance versus conventional landlines and powerlines and stresses the urgency of the situation as well as the stakes involved. Green Bay CTC contends that it did not mislead the Commission in any way because the Red Cross did in fact request Green Bay CTC participation and indicated immediate need for service not vulnerable to landline disruptions; a disaster simulation was scheduled and did occur; and the public safety of the Green Bay area was materially enhanced. Regarding the technical showing in its modification application, Green Bay CTC asserts that it was in full compliance with Commission Rules. Green Bay CTC emphasizes that: the antenna pattern diagram submitted is a standard, manufactured-sanctioned diagram in common usage; and calculations regarding line loss data used to determine ERP and distance to contours is no longer required to be furnished.

DISCUSSION

6. We find BCLP's allegations that Green Bay CTC misled the Commission regarding the need for an STA grant to be without merit. The record supports Green Bay CTC's assertions that it was asked by the Red Cross to assist in a disaster simulation in March and that indeed the Red Cross did want "communications [that] can be maintained successfully in spite of conventional system failure." (Red Cross letter), which, contrary to BCLP's assertion, could only be provided by Green Bay CTC. Moreover, Green Bay CTC's STA request did not use words such as "emergency", "urgent", or words to that effect to mislead the Commission. As for Green Bay CTC's alleged failure to show "extraordinary circumstances" justifying an STA, we conclude that granting the STA request materially enhanced the public safety in the Green Bay area and, as such, is consistent with the intent of Section 22.25(b)(4).[9]

7. As for BCLP's engineering assertions directed against Green Bay CTC's modification application, we concur with Green Bay CTC that its antenna pattern diagram is in common usage and acceptable because it has submitted a permissive minor amendment that fully complies with the Commission's requirements.[10] As for the line gain/loss allegations, calculations are no longer required to be submitted with the application. *See* Public Notice, Mimeo No. 2973, released Mar. 24, 1982, at 3-4. Therefore, having found that Green Bay CTC's modification application as amended meets the Commission's engineering and technical requirements, we in turn grant the modification application.

ORDERING PARAGRAPHS

8. Accordingly, IT IS ORDERED that the Petition to Reconsider Grant of Special Temporary Authority and Informal Request to Revoke License filed by Brown County MSA Cellular Limited Partnership IS DENIED.

9. IT IS FURTHER ORDERED that the Petition to Dismiss or Deny filed by Brown County MSA Cellular Limited Partnership IS DENIED.

10. IT IS FURTHER ORDERED that the authority for a major modification of the application as amended of Green Bay CellTelco in File No. 00667-CL-MP-88 IS GRANTED.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petition for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Rules.

FEDERAL COMMUNICATION COMMISSION

Kevin J. Kelley
Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The *Petition to Dismiss* essentially refers to, and incorporates by reference the allegations in the *Petition to Reconsider*.

[2] Appended to its STA request was a letter from Martin J. Jansen, Director! of Emergency Services, American Red Cross (Lakeland Chapter), Green Bay,! Wisconsin, to Mike Grady (Feb 23, 1988).

[3] *See* letter from Kevin J. Kelley (Kelley), Chief, MSD, to Donald J. Evans, Esq. (Evans) (counsel for Green Bay CTC) (Mar. 8, 1988) (*STA grant*). On March 10, 1988, Green Bay CTC filed a minor amendment to its modification application to correct antenna coordinates previously listed therein (and, thus, correcting to those specified in the *STA grant*). On May 9, 1988, Green Bay CTC filed a letter requesting a 60-day extension of the *STA grant* and in support, attached a May 6 letter to the Red Cross regarding Green Bay CTC participation in the Red Cross' June disaster simulation. The MSD granted the 60-day STA extension request on May 12 until July 24, 1988. *See* letter from Kelley to Evans (May 12, 1988) (*STA extension grant*). BCLP filed an opposition letter to the extension request one day after the *STA extension grant*.

[4] Section 22.25(b)(4) states:

> (b) Special temporary authorizations may be granted without regard to the 30-day public notice requirements . . . when:
>
> (4) The authorization is made upon a finding that there are extraordinary circumstances requiring operation in the public interest and that delay in the institution of such service would seriously prejudice the public interest.

[5] BCLP points out that the letter was addressed to the Appleton, WI non- wireline operator although it was to be filed on Green Bay CTC's behalf. As a result of its real party-in-interest allegations, BCLP has in turn also filed a petition to dismiss or deny the application, File No. 00720-CL-TC-1-88, seeking transfer of control of Green Bay CTC from Miller Communications to McCaw Communications of Green Bay, Inc. (McCaw). That application and resulting pleadings will be handled in a separate proceeding.

[6] BCLP has appended a March 29, 1988, follow-up Red Cross letter and asserts that neither this letter nor the earlier Red Cross letter indicates any urgent need for immediate initiation of non-wireline service in Brown County.

[7] BCLP incorrectly cited Section 22.15(l)(4) in support of its argument.

[8] This allegation is rejected. The allegation is premised on Green Bay CTC's failure to wait 14 days after the filing of its FCC Form 489 covering license to begin operations. Inasmuch as a non-wireline cellular permittee (such as Green Bay CTC) may begin service immediately upon filing its Form 489, the MSD erred in including the wireline's condition for operating in Green Bay CTC's radio station authorization license. *See also* Public Notice, Rpt. No. CL-88-115, Mimeo No. 3107, released May 24, 1988, at 7, in File No. 00661-CL-L-88, which corrected the error.

[9] Moreover, we refuse to draw any negative inferences from the fact that the Red Cross letter was addressed to the Appleton, WI operator. We accept Green Bay CTC's uncontested assertions that the Green Bay and Appleton systems are technically integrated with administrative headquarters in Appleton, but that the two systems are separately structured, owned, financed and controlled.

[10] Green Bay CTC's amendment, filed on April 13, 1988, demonstrated the orientation of the antenna azimuth with respect to true north and showed the half-wave reference point on its antenna pattern.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88- 341

In the Matter of

MTS and WATS Market Structure,

LINK UP AMERICA, and

Amendment of Part 36 of the
Commission's Rules and
Establishment of a Joint Board

NOTICE OF PROPOSED RULE MAKING

Adopted: June 23, 1988; Released: July 18, 1988

By the Commission:

I. INTRODUCTION

1. In 1983 this Commission adopted a system of tariffed charges, generally known as the access charge plan, for the recovery of local exchange carrier (LEC) costs attributable to the origination or termination of interstate calls.[1] We concluded that the access charge plan would preserve universal service, promote economic efficiency, eliminate service pricing discrimination, and deter uneconomic bypass.

2. The preservation of universal service is a basic goal of this Commission. To further that goal, we adopted the recommendation of the CC Docket 80-286 Federal-State Joint Board to establish a federal assistance program, generally known as the Lifeline assistance program.[2] That program helps low-income households stay on the network by providing matching assistance to subscribers receiving benefits under a qualifying state or local telephone company assistance plan.[3] Qualifying subscribers are exempted from the monthly subscriber line charge when federal assistance is matched by state benefits.

3. Later we adopted further recommendations of that Joint Board to create a federal connection assistance program known as "Link Up America."[4] The Link Up program is designed to encourage low-income households to subscribe to local exchange service by reducing high connection charges. Link Up provides federal assistance to cover one half of connection charges, up to30, for eligible low-income beneficiaries. Additionally, when a local exchange carrier offers a deferred payment plan for service commencement charges and does not assess the subscriber any interest charges, federal assistance is available to that carrier to cover the interest on deferred costs of up to200. Response to our federal assistance programs has been positive. Nevertheless, we tentatively conclude that some revisions in the the eligibility criteria for the Link Up program may be desirable. Accordingly, we request that the CC Docket 80-286 Joint Board review these eligibility criteria and submit recommendations.

II. BACKGROUND

4. The Joint Board recommended and this Commission adopted eligibility criteria to target Link Up assistance to low-income households that were not presently telephone subscribers becaue they could not afford high connection costs. Section 36.7ll(b) of our Rules provides that the applicant must: (l) have lived at an address where there has been no telephone service for at least three months; (2) not have received Link Up assistance within the last two years; (3) not be a dependent for federal income tax purposes, unless older than 60 years of age; and (4) meet the requirements of a state-established income test.[5] Our rules require that the applicant certify that each of these criteria are satisfied. The rules also require that the state or telephone company verify either the three month and two year requirements or verify the income requirement. 47 C.F.R. Section 36.721(a)(2)-(3). By way of comparison, eligibility for federal lifeline assistance is based on verification of income alone, with no additional non-income criteria.[6]

5. As of May 5, 1988, thirty states and the District of Columbia have been certified for federal assistance though Link Up.[7] However, telephone companies in Maine, New York, and Wisconsin have informed this Commission that they decline to participate in the Link Up program because those companies object to the three month rule and the two year rule. The telephone companies believe that those rules will prevent deserving low-income households from subscribing to local exchange service, and thereby, impede universal service.

6. Two state agencies, the New York Department of Public Service (New York) and the Maine Public Utilities Commission (Maine), sought waivers of the Link Up eligibility rules. The Common Carrier Bureau denied those petitions.[8] Maine filed a motion combining a petition to reconsider the denial of its waiver request, a petition to commence a Rule Making to repeal the three month and two year eligibility requirements for Link Up, and a petition for reconsideration of the rules.[9] The Common Carrier Bureau denied the petition for reconsideration of the waiver request, and stated that the issues will be considered in the pending reconsideration proceeding relating to the adoption of the Joint Board recommendations.[10] We have decided, however, to address the wisdom of the three month and two year eligibility requirements in a new proceeding.

III. DISCUSSION

7. New York and Maine question the wisdom of rules which require low-income households to be off the network for three months, and to not have received Link Up assistance for the past two years, before obtaining federal Link Up benefits. They both contend that these rules impede universal service. New York and Maine observe that low-income subscribers move more frequently than other subscribers because of housing and employment problems.[11] In designing its own connection assistance program, Maine considered eligibility criteria similar to ours. However, Maine decided to adopt less restrictive rules based in part on the reasoning that low-income persons do not move in order to receive an installation subsidy, in order to avoid payment of telephone bills, or for frivolous reasons.[12]

8. Our decision to adopt the criteria recommended by the Joint Board was, of course, based in part upon the premise that any program should be designed to further the goals of the Communications Act. Promoting universal service is a goal of the Act. The "off the network for three months" requirement is logically related to the statutory scheme. That requirement was designed to limit assistance to low-income households that would not be likely to subscribe to local exchange service in the absence of such assistance.

9. Nevertheless, this requirement should be reevaluated if it creates a barrier to participation in the Link Up program. Any barrier to participation frustrates efforts to promote universal service. There is reason to believe that the "off the network for three months" requirement may be a significant barrier to participation in the Link Up program. Experience in four "test markets" indicates that approximately 15% of Link Up applicants have been rejected for failure to meet the three-month rule. [13] Additionally, every state and LEC participating in Link Up has opted to verify income eligibility, because they found that verification of the three-month and two-year rules was administratively and economically infeasible, and impractical.

10. Maine acknowledges that elimination of the three month and two year rules could increase outlays, but asserts that "the additional revenue derived from the increased saturation of telephones may well exceed the incremental costs" of the program.[14]

11. The decision to make assistance available to each household only once every two years was designed to moderate the potential cost of the program. The goal of universal service must be balanced against the costs of achieving that goal. We believe it would be desirable to reevaluate this restriction in light of some actual experience with the program. If the current program is much less costly than we anticipated, then this requirement can be eliminated without upsetting the balance we hoped to achieve.

12. When we adopted the Link Up program, we relied upon an estimate of five million unconnected low-income households to determine the cost of connecting all low-income households that do not subscribe to local exchange service.[15] Recent information indicates that the number of qualified low-income households expected to take advantage of Link Up under the current rules will be lower than the maximum level we originally projected. Information gathered in our monitoring program regarding the Lifeline programs reveals that the number of potential recipient households may be much smaller than the five million estimate. In 1987, there were about 90 million households in the United States, of which 13% were below the poverty line. Of the 11 million households below the poverty line, about 2.9 million (24.7%) are without phone service.[16] Thus, it now appears that our original estimate was too high. Additionally, we are aware that the eligible population is reduced in many states to recipients of certain assistance programs or by other age or disability criteria. Accordingly, it appears that we may be able to expand the scope of the program without exceeding our original cost estimates.

IV. CONCLUSION

13. For all the foregoing reasons, we believe that an examination of the Link Up program eligibility criteria would be appropriate at this time. We invite comment on the advantages, disadvantages, and costs of amending the eligibility rules and request a recommended decision from the CC Docket 80-826 Joint Board.

14. Appendix A contains proposed amendments to Section 36.721 that would eliminate the two year and three month rule for states and telephone companies which verify income eligibility, and retain the rules for states and telephone companies which do not verify income eligibility.

15. We certify that the Regulatory Flexibility Act[17] is not applicable to the rule changes we are proposing in this proceeding. In accordance with Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of the publication of this *Notice* in the Federal Register. As part of our analysis of the proposal described in this Notice, however, this Commision will consider the impact of the proposal on small telephone companies, *i.e.*, those serving 50,000 or fewer access lines.[18] The action proposed herein would have a beneficial economic impact on such telephone companies because it would be likely to reduce the administrative burden of determining subscriber eligibility for connection assistance.

16. For purposes of this non-restricted notice and comment proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period.[19] The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission: (1) releases a final order; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or, (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission, Joint Board member or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding.[20]

17. In general, an *ex parte* presentation is any written communication (other than formal written comments or reply comments) directed to the merits or outcome of a proceeding made to any member, officer, or employee of the Commission who is or may reasonably be expected to be involved in the decisional process in the proceeding and which, if written is not served on the parties to the proceeding, and, if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present.[21] Any person who makes or submits a written *ex parte* presentation shall serve, on the same day it is submitted, a copy of same on the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation presenting data or arguments not already reflected in that person's previously-filed written comments, memoranda, or other previous filings in the proceeding shall provide, on the day of the oral presentation, a written memorandum to the Secretary (with a copy to the Commissioner, Joint Board member, or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described

above must state on its face that the Secretary has been served, and also state by docket number the proceeding to which it relates.[22]

18. For Joint Board actions, special *ex parte* rules apply.[23] For Joint Board actions, all written materials that are not filed in accordance with a pleading cycle established by the Joint Board shall be accompanied by a Petition for Leave to File showing cause why the material should be considered by the Joint Board. The Joint Board will not consider any filing made outside the authorized pleading cycle and received by the Commission less than fifteen days[24] in advance of a Joint Board meeting at which the Joint Board is to consider the subject matter of that filing. Written *ex parte* presentations, as defined by the Commission's rules, need not be accompanied by a Petition for Leave to File and may be received in the discretion of the Joint Board member or staff personnel involved. No written *ex parte* presentations, however, shall be made during the fifteen day period immediately preceding a Joint Baord meeting except in response to an inquiry by a member of the Joint Board or its staff.

19. All relevant and timely comments and reply comments will be considered by the Joint Board and this Commission. In reaching a decision, we may take into account information and ideas not contained in the comments, provided that such information, or a writing containing the nature and source of such information, is placed in the public file and provided that the fact of the Commission's reliance on such information is noted in the Order.

V. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED, pursuant to our authority under Sections 4, 201, 202, 203, 205, 218, 221(c), 403, and 410(c) of the Communications Act of 1934 as amended, 47 U.S.C. Sections 154, 201, 202, 203, 205, 218, 221(c), 403, and 410(c), that NOTICE IS HEREBY GIVEN of proposed Rule Making.

21. IT IS FURTHER ORDERED, that comments on the proposed Rule 36.721(a) SHALL BE DUE on **September 6, 1988,** and reply comments SHALL BE DUE on **September 21, 1988.** Comments and reply comments shall be filed with the Secretary, Federal Communications Commission, and served upon the CC Docket 80-286 Joint Board members and staff as set forth in Appendix B.

22. IT IS FURTHER ORDERED that in accordance with the provisions of Section 1.419(b) of this Commission's Rules, 47 C.F.R. Section 1.419(b), an original and five copies of all comments, replies, pleadings, briefs and other documents filed in the proceeding SHALL BE FURNISHED to the Commission. Members of the public who wish to express their views by participating informally may do so by submitting one or more copies of their comments without regard to form (as long as the docket number is clearly stated in the heading). Copies of all filings will be available for public inspection during regular business hours in the Commission's Docket Reference Room (Room 239) at its headquarters at 1919 M Street, N.W., Washington, D.C.

23. IT IS FURTHER ORDERED that the Joint Board shall consider the issues raised in the Notice and submit recommendations to this Commission for its consideration.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX A

Part 36 of Title 47 C.F.R. is proposed to be amended to read as follows:

2. Section 36.721 is proposed to be revised to read as follows:

The Authority for Part 36 continues to read: Sections 4, 201, 202, 203, 205, 218, 221(c), 403, and 410(c) of the Communications Act of 1934 as amended, 47 U.S.C. Sections 154, 201, 202, 203, 205, 218, 221(c), 403, and 410(c).

Section 36.721. Telephone company eligibility for lifeline connection assistance expense allocation.

(a) In order to be entitled to the additional interstate expense adjustment described in this Subpart a telephone company:

(1) Must provide Lifeline Connection Assistance as defined in Section 36.711(a)(1) and/or Section 36.711(a)(2) to eligible subscribers as defined in Section 36.711(b);

(2) Shall verify that subscribers meet the eligibility criteria set out in Section 36.711(b) provided that:

(i) Verification of subscriber eligibility by designated state officials may be substituted for verification by the telephone company;

(ii) If the eligibility criterion in Section 36.711(b)(4) is verified, then the criteria in Section 36.711(b)(1) and (2) shall not apply;

(iii) If the eligibility criterion in Section 36.711(b)(4) is self-certified, then the eligibility criteria in Section 36.711(b)(1) and (2) shall apply and must be verified;

(iv) In all cases, the eligibility criterion in Section 36.711(b)(3) may be self-certified.

(3) Shall file information with the Commission Secretary demonstrating that it is eligible for the additional interstate expense adjustment.

(b) The additional interstate expense adjustment shall be effective as soon as the Commission certifies that the state or local telephone company is eligible for the additional interstate expense adjustment, the local exchange company files the data required by Section 36.731 with the National Exchange Carrier Association, and the relevant tariff provisions become effective.

APPENDIX B

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FOOTNOTES

[1] MTS and WATS Market Structure, Third Report and Order, CC Docket No. 78-72, 93 FCC 2d 241 (1983), *modified on reconsideration*, 97 FCC 2d 682 (1983), *further modified on reconsideration*, 97 FCC 2d 834 (1984), *aff'd in principal part and remanded in part*, National Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F. 2d 1095 (D.C. Cir. 1984), *cert denied*, 105 S.Ct. 1224 1225 (1984), *modified on Third Reconsideration*, 99 FCC 2d 708 (1984), *further modified on Fourth Reconsideration*, 101 FCC 2d 1222 (1985), *aff' d on further reconsideration*, 102 FCC 2d 849 (1985).

[2] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, FCC No. 85-643 (released December 27, 1985), 51 Fed. Reg. 1371 (January 13, 1986).

[3] *See* , 47 C.F.R. Section 69.203, *et seq.*

[4] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 2953 (1987).

[5] Assistance is available for one telephone line per household at the applicant's principal place of residence.

[6] 47 C.F.R. Section 69.203(h)(1).

[7] The states are: Alabama, Arizona, Arkansas, Colorado, Connecticut, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, and West Virginia.

[8] Letter of Gerald Brock, Chief, Common Carrier Bureau, to John J. Kelliher, Secretary, State of New York Department of Public Service, November 2, 1987; Letter of Gerald Brock, Chief, Common Carrier Bureau, to Charles Jacobs, Administrative Director, State of Maine Public Utilities Commission, August 11, 1987.

[9] Motion for Reconsideration and Petition for Rule Making (Motion), September 10, 1987.

[10] State of Maine Public Utilities Commission, DA 87-1530, 2 FCC Rcd 6646 (October 27, 1987).

[11] Maine notes that according to the Bureau of the Census, 29.6% of households on public assistance moved, but only 13.6% of households not on public assistance moved, in the year March 1983 through March 1984. Motion at 8.

[12] *Id.* at 7.

[13] "Link Up America Tracking," United States Telephone Association (USTA) (January 1988). USTA collects and informally supplies to the Commission monthly data based on telephone company customer representative contacts with Link Up applicants. The four test markets are Arkansas, Texas, Washington, D.C. and West Virginia.

[14] Motion at 10.

[15] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, FCC 87J-1, 52 Fed. Reg. 19,896 (May 18, 1987) at Para. 5.

[16] Monitoring Report, CC Docket 87-339, Federal-State Joint Board, Table 1.40 (December 1987) at 50.

[17] 5 U.S.C. Section 601, *et seq.* (1987).

[18] Because of the nature of local exchange and access service, this Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* , MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, this Commission is not required by the terms of that Act to apply the formal procedures set forth therein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

[19] *See generally* 47 C.F.R. Section 1.1206(a).

[20] 47 C.F.R. Section 1.1203.

[21] 47 C.F.R. Section 1.202(b).

[22] 47 C.F.R. Section 1.1206.

[23] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 89 FCC 2d 36 (1982).

[24] In calculating this fifteen day period, neither the day on which the material is filed nor the day on which the Joint Board meeting is scheduled shall be counted.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-138

In re Applications of

ELAINE C. EICHER	File No. BPH-850712ZH
HOME TOWN BROADCASTING, INC.	File No. BPH-850712ZI
JAMES A. POUNDS	File No. BPH-850712O2

For Construction Permit
for a New FM Station
Appomattox, Virginia

ORDER

Adopted: July 12, 1988; Released: July 27, 1988

By the Review Board: BLUMENTHAL and ESBENSEN; Board Chairman MARINO absent.

1. On July 1, 1988, James A. Pounds (Pounds), Elaine C. Eicher (Eicher), and Home Town Broadcasting, Inc. (Home Town), the three remaining applicants in this proceeding,[1] filed a Joint Petition for Approval of Settlement Agreement. On July 6, 1988, Pounds and Home Town each filed supplements to the Joint Petition; and, on July 7, Eicher filed a supplement. Previously, in an *Initial Decision*, 3 FCC Rcd 812 (ALJ 1988), presiding Administrative Law Judge Walter C. Miller denied Home Town's application because it violated the Commission's cross-interest policy; found Pounds and Eicher were each entitled to 100% quantitative "integration" credit; and granted the Eicher application based solely on her qualitative enhancements, but noted that Pounds was also a highly qualified applicant, being a career broadcaster with "a sterling record of broadcast experience [who is] . . . ready for an ownership role." *Id.*, Concls. para. 15. The Joint Petition, as supplemented, which is accompanied by complete copies of the settlement agreements and which calls for the grant of the Pounds application, will be granted because it fully complies with Section 73.3525(a) of the Commission's Rules, 47 CFR §73.3525(a), which implements Section 311(c) of the Communications Act of 1934, as amended, 47 U.S.C. §311(c).

2. The settlement agreements provide that, upon Commission approval, the Pounds application will be granted, the Eicher and Home Town applications dismissed, and Pounds will pay monetary consideration to Eicher (170,000) and Home Town (62,500) for the voluntary dismissal of their applications. The applicants have submitted declarations of their principals, under penalty of perjury, stating that the applications were not filed for the purpose of reaching or carrying out a settlement agreement, *see* 47 CFR §73.3525(a)(2), and that approval of the settlement agreements will serve the public interest by expediting the inauguration of a new FM service to Appomattox and by conserving the resources of the Commission and the parties. *See* 47 CFR §73.3525(a)(1).

3. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed on February 23, 1988 by Maranatha Broadcasting Company, Inc. IS DISMISSED; and

4. IT IS FURTHER ORDERED, That the Joint Request for Approval of Settlement Agreement filed on July 1, 1988, as supplemented by the parties on July 6 and 7, 1988, IS GRANTED; that the settlement agreements ARE APPROVED; that the exceptions of the parties ARE DISMISSED; that the applications of Elaine C. Eicher (File No. BPH-850712ZH) and Home Town Broadcasting, Inc. (File No. BPH-850712ZI) ARE DISMISSED; that the application of James A. Pounds (File No. BPH-850712O2) to establish a new FM broadcast station at Appomattox, Virginia IS GRANTED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTE

[1] Previously, in an *Order*, FCC 88R-33, released June 22, 1988, the Review Board dismissed a fourth applicant, Maranatha Broadcasting Co., Inc., and approved a settlement agreement between Maranatha and the three captioned applicants. Maranatha's ownership amendment is now moot and therefore is dismissed.

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 87-107

In the Matter of

Amendment of Part 15 of the
Commission's Rules Concerning
Input Selector Switches Used
In Conjunction with Cable
Television Service

ERRATUM

Released: July 26, 1988

The Memorandum Opinion and Order (FCC 88-208), released on July 11, 1988, in the captioned proceeding is hereby corrected to indicate the effective date as **August 17, 1988.**

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-169

In re Applications of

TULSA BROADCASTING GROUP, A Limited Partnership — File No. BPCT-840921LI

Willis Mathews, Jr., Jay WhiteCrow and Barbara Johnson d/b/a NATIVE AMERICAN BROADCASTING COMPANY, A Limited Partnership — File No. BPCT-850108KO

TULSA TELEVISION, LTD. — File No. BPCT-850108KU

For Construction Permit
for a New Television Station
Tulsa, Oklahoma

ORDER

Adopted: July 13, 1988; Released: July 26, 1988

By the Commission:

1. The Commission has before it: (a) Applications for Review of a Review Board decision, 2 FCC Rcd 6124 (1987), filed November 9, 1987 by Tulsa Broadcasting Group and Tulsa Television, Ltd.; and (b) Oppositions thereto filed November 24, 1987 by Native American Broadcasting Company.[1]

2. In concluding that the Board's decision should be allowed to stand, we did not consider the activities of TTL's limited partners before their signing of the limited partnership agreement. Their subsequent actitivites – filing and prosecuting TTL's application through hearing and obtaining a second antenna site later specified in an amendment to TTL's application – were sufficient to view them as active rather than as passive investors for purposes of the integration analysis. *See* 2 FCC Rcd at 1161-62 ¶ 110.

3. IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g) the above-mentioned Applications for Review ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTE

[1] Native American Broadcasting Company has also submitted a copy of a recent Review Board decision, 3 FCC Rcd. 870 (1988), in the Omaha, Nebraska comparative TV proceeding. We have not relied on that decision in our disposition of the Applications for Review now before us in this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

T-COM, INC. File No. 23420-CD-P/L-01-8

For authority to establish a new base station in the Public Land Mobile Service operating on frequency 454.400 MHz at Detroit and Southfield, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: July 14, 1988; Released : July 26, 1988

By the Chief, Mobile Services Division:

1. Michigan Bell Telephone Company (Michigan Bell) has filed a petition to dismiss or deny the captioned application of T-COM, INC., (T-Com). [1] T-Com requests authority to construct two-way facilities to operate on frequency 454.400 MHz at Southfield and Detroit, Michigan. T-Com has filed an opposition to the petition.

2. Michigan Bell operates its station KQK580 on frequency 454.500 MHz at Ann Arbor, Michigan. The petitioner argues that if T-Com's application is approved its station will receive harmful co-channel interference within its Reliable Service Area Contour (RSAC). According to Michigan Bell, an interference study conducted by an engineering consulting firm, Teletech, Inc., demonstrates that the proposed T-Com/Southfield interference contour will penetrate the KQK580 RSAC by a distance of 0.5 miles along the interstation radial. The interference study submitted by T-Com for its Detroit station shows that it meets the required minimum ratio of RSAC field strengths for interference-free operation by 2.1 db. Michigan Bell contends, however, that T-Com has placed the null or rear lobe of its highly directional Yagi antenna along the interstation radial to achieve these results. Michigan Bell maintains that T-Com has failed to comply with Section 22.15(b)(2)(i) of the Commission's rules since its did not demonstrate that its proposed Detroit station will not cause harmful electrical interference to Michigan Bell's Ann Arbor station. Michigan Bell also complains that T-Com's application contains errors consisting of incorrect addresses for both the Southfield and Detroit sites and an apparent inconsistency between the street address for the Detroit station and the listed coordinates. Petitioner suggests that the application may contain other errors of a more substantial nature.

3. In response, T-Com asserts that Michigan Bell is incorrect that its application failed to provide protection to station KQK580. T-Com explains that while its original Carey study for the Southfield location was correct, an idiosyncrasy of the computer program used by T-Com's consultants resulted in the incorrect power value printed on T-Com's Carey study. T-Com states that the computer program used by T-Com's engineer rounds the input power value to the nearest tenth of a watt but performs the Carey calculations using the actual input value. This results, T-Com contends, in the rounding of the input value of 0.08 watts to 0.1 watts by the computer for output purposes while the Carey calculations were performed using the 0.08 watt value. T-Com has filed a minor amendment to correct geographical descriptions and has reduced power at both the Detroit and Southfield locations.

4. T-Com challenges Michigan Bell's allegation that T-Com placed the null of its directional Yagi antenna along the interstation radial. T-Com asserts that Michigan Bell has erred by using the radiation pattern for the PD161 antenna rather than the pattern for the PD461 antenna. According to T-Com, the application is clear that the PD461 antenna is the proposed antenna. For this location, T-Com also has reduce itsed power at Detroit from 400 watts to 320 watts.

DISCUSSION

5. After careful consideration of the facts and arguments presented, we conclude that the petition should be denied. Our own review of the application as amended indicates that no harmful interference problems will be caused to Michigan Bell's station by T-Com's proposal. In addition, the discrepancies and errors mentioned by Michigan Bell are minor and do not indicate a pattern of errors or other inaccuracies in the application. In any event, T-Com has amended its application to correct the admitted errors and to reduce power at both locations to ensure no harmful interference to Michigan Bell's station occurs.

6. Accordingly, IT IS ORDERED, that the application of T-COM, INC., File No., 23420-CD-P/L-01-86 IS GRANTED.

7. IT IS FURTHER ORDERED that the Petition to Dismiss or Deny filed by Michigan Bell Telephone Company IS DENIED.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] Because its petition is untimely filed, Michigan Bell asks that if we do not accept its petition as a formal pleading, we accept the filing as an informal objection. We grant the alternative relief requested.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-72
CC Docket No. 80-286

In the Matter of

MTS and WATS Market Structure

Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION AND ORDER INVITING COMMENTS

Adopted: July 8, 1988; Released: July 12, 1988

By the Commission:

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I. INTRODUCTION

1. This order addresses several requests for reconsideration of our May 19, 1987, *Report and Order* in this proceeding.[1] In that *Order*, we adopted, with minor modifications, a comprehensive set of recommendations concerning the implementation of subscriber line charges, the federal lifeline assistance program, high cost assistance, and common line pooling that had been presented by the Docket 80-286 Joint Board in a *Recommended Decision and Order* released on March 31, 1987.[2]

2. The petitioners seek reconsideration of various aspects of the determinations regarding the level and schedule of subscriber line charge increases, the allocation of the first such increase to reduce the originating carrier common line (CCL) charge, and the rules governing the structure of the non-traffic sensitive (NTS) pool. In addition, NECA requests certain limited revisions to several sections of Part 69 of our Rules to facilitate the administration of these requirements. [3]

3. Our review of the petitions for reconsideration and the responsive pleadings[4] leads us to conclude that the fundamental decisions reached in the *Order* on the level and timing of subscriber line charge increases, the allocation of the decreases in the CCL charge, and the structure of the NTS pool should be affirmed. We do, however, adopt several limited modifications of our Part 69 Rules in response to technical concerns raised by petitioners.

II. BACKGROUND

4. In our 1983 *Access Charge Order*, this Commission adopted a system of tariffed access charges for the recovery of the cost of local exchange carrier (LEC) plant and expenses used in the origination and termination of interstate calls.[5] This comprehensive access charge plan was designed to further the four fundamental goals of this proceeding: preserving universal service, promoting economic efficency, eliminating pricing discrimination, and deterring bypass. The recovery of a significant proportion of local loop costs allocated to the interstate jurisdiction directly from telephone subscribers through monthly flat-rate subscriber line charges was a key element of that integrated scheme. Most of these charges, however, were not implemented when the initial access charges became effective. We decided to defer subscriber line charges for residential and single-line business customers in order to examine their effect on those subscribers.[6]

5. We asked the Docket 80-286 Joint Board to assist us in that examination.[7] That Joint Board issued its initial recommendations on the subscriber line charge, lifeline and high cost assistance issues raised in these proceedings in November 1984.[8] In that decision, the Joint Board recommended that subscriber line charges be implemented subject to an interim cap of2.00 for residential and single-line business subscribers, and remain at that level until the completion of a further Joint Board proceeding to study the effects of these charges, including their impact on universal service, bypass, and economic efficiency. These Joint Board recommendations were, with minor modifications, adopted by this Commission in December 1984.[9]

6. Pursuant to the Joint Board's recommendation, in July 1986 we released a *Further Notice of Proposed Rule Making* to undertake a broad study of the effects of the implementation of the Joint Board's recommendations in terms of the goals of this proceeding. The *Further Notice* also sought the Joint Board's further recommendations on

subscriber line charges, high cost assistance, the lifeline programs, and possible modifications to the current provisions for mandatory nationwide pooling of common line costs and revenues.[10]

7. Based upon its careful study of the record, the Joint Board presented its conclusions and recommendations on these issues in the *Recommended Decision*. The Joint Board concluded that the record before it demonstrated that its 1984 recommended plan had advanced the four goals of this proceeding, introducing increased economic efficiencies, minimizing bypass incentives, and mitigating service pricing discrimination while preserving universal service. From these conclusions, the Joint Board developed further recommendations for progress on these long-standing, interrelated NTS recovery issues. As part of this comprehensive plan, the Joint Board determined that modest subscriber line charge increases would further the four goals of this proceeding, and would also permit needed restructuring of the existing common line tariff and pooling system. In addition, the Joint Board found that efficiencies gained from the increased subscriber line charges and decreased CCL charge would permit more extensive federal lifeline assistance programs. Specifically, the Joint Board recommended that the cap on subscriber line charges for residential and single-line business customers be increased to2.60 on June 1, 1987,3.20 on September 1, 1988, and3.50 on April 1, 1989, and that the cap on subscriber line charges for embedded Centrex lines be increased to4.00 on June 1, 1987, 5.00 on September 1, 1988, and6.00 on April 1, 1989.[11] The Joint Board stated that these changes constitute a permanent solution to the NTS recovery issues before it.

8. The Joint Board's *Recommended Decision* endorsed the existing lifeline assistance program, which exempts qualifying subscribers from subscriber line charges when matching state benefits are provided pursuant to a certified state plan,[12] and proposed that the federal benefits be increased to correspond with the prescribed subscriber line charge increases.[13] In addition, the Joint Board recommended that the subscriber line charge waiver program be supplemented by a new program targeted to provide assistance to reduce the initial service installation and connection charges that appear to be a major barrier to subscribership for low income groups. This second program, which has become known as "Link Up America", would offset one half these charges for commencing telephone service, up to30, for qualifying households. The Link Up America program also encourages LECs to offer deferred payment schedules for these charges by paying a LEC's interest costs, on an amount up to200, when the LEC establishes a deferred payment schedule and does not charge interest to qualified subscribers.[14] The Joint Board further recommended that the interstate costs associated with the expanded subscriber line charge waiver and Link Up America programs be recovered through charges assessed on interexchange carriers (IXCs).[15]

9. The Joint Board also reviewed the existing high cost assistance measures, which permit LECs in study areas with above-average loop costs to allocate additional costs to the interstate jurisdiction, and recommended retargeting the high cost assistance to provide greater assistance to small and medium size LECs and less assistance to larger LECs. Finally, the Joint Board recommended significant modifications in the existing common line tariff and pooling system. Under the proposed approach, LECs would be permitted to withdraw from the NECA tariff and pool, and file common line tariffs based on their own costs. LECs leaving the pool would, however, be obligated to make payments to the common line pool to keep the pooled CCL rates essentially unaffected.[16] In this way, the Joint Board concluded, large companies wishing to establish more cost-based CCL rates, for bypass or other reasons, could do so without adversely affecting the CCL rate charged by the smaller carriers that remain in the pool.[17]

10. In order to assure that the various proposals achieve the desired results, the Joint Board proposed that we establish an expanded monitoring program. The monitoring program would include ongoing quarterly reports and a 90-day review based on these reports in advance of the final subscriber line charge increases.

11. This Commission adopted the Joint Board's conclusions and integrated recommendations regarding subscriber line charges, expansion of federal lifeline assistance, the retargeting of the high cost assistance fund, and modifications to the pooling system in our May 19, 1987, *Order*.[18] Our *Order* did, however, make minor modifications in the proposed implementation schedule. The *Order* required implementation of the first.60 subscriber line charge increase on July 1, 1987, rather than June 1, 1987, and of the second .60 increase on December 1, 1988, instead of September 1988 in order to permit more thorough monitoring of the impact of the initial .60 increase. We also adopted the expanded monitoring program proposed by the Joint Board in its *Recommended Decision*.[19] This ongoing monitoring process is already underway.

III. SUBSCRIBER LINE CHARGE MODIFICATIONS

A. Level and Timing of Modified Charges

1. Positions of the Parties

12. Several parties filed petitions seeking reconsideration of various aspects of our *Order* relating to the level and timing of subscriber line charge increases. California and the D.C. PSC contend that the prescribed increases are premature because this Commission and the Joint Board have not yet thoroughly analyzed the impact of subscriber line charges on universal service.[20] California also claims that the proposed subscriber line charge increases could result in earnings that would exceed interstate NTS revenue requirements in some jurisdictions when considered in combination with the CCL charges.[21] The D.C. PSC alleges that the nationwide averaged increases are inequitable for the District of Columbia because these increases ultimately will result in end users paying virtually all of the "base factor portion" of interstate loop costs in the District, while IXCs pay very little of the NTS costs of the local network. To remedy this situation, the D.C. PSC proposes that subscriber line charges be kept at2.00 in the District of Columbia, or, at a minimum, that these charges be increased only to the extent that IXCs pay 50 percent of interstate NTS costs.[22] California further asserts that the proposal for a transition from use of a subscriber plant allocation factor to a subscriber line usage factor described in its earlier pleadings in this docket is preferable to the approach adopted.[23]

13. NASUCA states that future subscriber line charge increases should be made contingent on affirmative findings of need based on the results of the monitoring process. It asserts that the Joint Board and this Commission have failed to evaluate properly the evidence in the record

on bypass and on the appropriate allocation of responsibility for NTS costs, and urges the Joint Board and the Commission to consider studies that contradict their conclusions more carefully.[24] NASUCA also suggests that public hearings should have been held prior to adoption of any subscriber line charge increases so that interested parties could have had the opportunity to cross- examine witnesses and question the evidence presented by opposing parties.[25]

14. Tennessee contends that the costs of providing and maintaining local exchange service should not be recovered directly from end users through increased subscriber line charges because, in its view, LECs could absorb all or part of these costs and still earn a fair return. Tennessee observes, for example, that the LECs' "cost of capital today and in the foreseeable future is substantially less than the 14.25% return on equity prescribed by the Commission last August," and submits that this differential leaves LECs with some flexibility in how they recover their costs.[26] Tennessee and the Indiana Consumer Counselor further propose that the subscriber line charge increases could be deferred or eliminated if tax benefits flowing to the LECs as a result of the Tax Reform Act of 1986 were applied to reduce the NTS revenue requirement.[27]

15. All of the parties that responded to the requests for reconsideration of the determinations regarding the level and timing of subscriber line charge increases oppose the petitioners' proposed changes. These parties contend that the arguments petitioners raise have, in most cases, been previously considered and properly rejected by the Joint Board and this Commission. They emphasize that the subscriber line charge increases are part of an integrated package of related changes, each of which is necessary to further the goals of this proceeding.[28]

16. Several commenters further observe that petitioners arguing that the Joint Board and this Commission have not adequately studied the effect of subscriber line charge increases on universal service have provided no evidence to support their claims. The responding parties note that the Joint Board and Commission orders demonstrate a thorough and careful study of the impact of subscriber line charges on universal service and the other goals of the proceeding. They argue that these conclusions were based on a full record that contained numerous analyses which fully justify the determination that the prescribed schedule and level of increases in conjunction with the other changes will bring substantial benefits to the public and will not adversely affect universal service.[29] In addition, they emphasize that the decision will be subject to an ongoing monitoring program designed to detect any adverse effects on penetration levels for telephone service.[30] Any problems resulting from the introduction of increased subscriber line charges will, they assert, be revealed in the monitoring process, so that the affirmative findings and public hearings advocated by NASUCA are "administratively burdensome, potentially disruptive and wholly unnecessary.[31]

17. A number of parties challenge the claim advanced by California and the D.C. PSC that the proposed subscriber line charge increases will ultimately produce revenues in excess of the revenue requirement in several jurisdictions, and leave IXCs paying less than their fair share of NTS costs. Bell Atlantic and Southwestern Bell emphasize that this Commission and the Joint Board recognized that uniform nationwide subscriber line charges would recover different amounts (in percentage terms) of NTS costs in different jurisdictions, but that such variations are necessary to achieve a fair recovery of NTS costs on a nationwide basis.[32] Bell Atlantic and AT&T further observe that both the California and D.C. PSC cost estimates consider only the base factor portion, and not all interstate NTS costs. Bell Atlantic states that in 1990 (when the3.50 charge is in effect for the entire year) end users in the District of Columbia will pay at most 75 percent of their total NTS costs; AT&T estimates that IXC payments will recover 53 percent of total interstate NTS costs in the District in 1987, 43 percent in 1988, and 34 percent in 1989.[33] AT&T, US West and USTA emphasize that no LECs will overrecover their costs under the access charge system.[34]

18. Parties responding to petitioners' arguments that the record evidence on bypass is not sufficent to justify the subscriber line charge increases unanimously oppose such claims. These parties emphasize that the Joint Board and Commission conclusions on bypass are based upon a well-developed record which reveals that the threat of uneconomic bypass continues to be a reality.[35] NYNEX, Ameritech and others observe that the conclusions NASUCA draws from the bypass study that accompanies its petition are contradicted by the evidence in the study, which indicates that price is in fact a major consideration in customer buying decisions.[36] These parties further observe that there is no indication that the NASUCA study is statistically reliable because it does not reveal relevant specifics on the conduct of the surveys reported in the study.

19. Several commenters respond to the Tennessee and Indiana Consumer Counselor suggestions regarding recent changes in the federal tax laws by contending that the question of what effect tax law changes should have on a carrier's interstate revenue requirement is a matter of ratemaking, and is inappropriate for resolution in a Rule Making proceeding.[37] US West and BellSouth note that there is no evidence in the record to indicate what, or even whether, surplus funds may exist as a result of tax law changes, but that it would in any event be inappropriate to direct any such savings to a particular purpose without examining the many ways in which the savings could be used.[38] USTA, Ameritech and US West assert that it would be inequitable and perhaps unlawful for this Commission to require LECs to absorb additional NTS costs without a full rate of return review proceeding.[39] USTA also observes that this Commission has already prescribed the carriers' rate of return for the current cycle, and asserts that the Tennessee and Indiana Consumer Counselor proposals are more properly raised in the next rate of return represcription.[40]

20. In reply, the Indiana Consumer Counselor reiterates its view that it would be entirely appropriate to reduce subscriber line charges with tax savings. It claims that it is indisputable that tax savings will occur, pointing to the substantial reduction in the marginal tax rate for corporations.[41] If these tax savings are not recognized, the Indiana Consumer Counselor concludes that LECs will experience inordinately high rates of return.[42]

21. In addition to its general request for reconsideration of the level and timing of subscriber line charge increases, the D.C. PSC also petitions us to reconsider the decision to increase such charges for embedded Centrex lines in the District of Columbia.[43] The D.C. PSC notes that 40 percent of all access lines in the District of Columbia are

Centrex lines, and that most of these are embedded Centrex lines as defined by our Rules. As a result, it is concerned that the Centrex subscriber line charge increases will have a much larger impact in the District of Columbia than in other jurisdictions, which could lead embedded Centrex customers to migrate to PBX- based services, causing upward pressure on rates for other local services. The D.C. PSC further claims that the Centrex rates in the District were set in reliance upon this Commission's prior statement that embedded Centrex subscriber line charges would remain at the same level as residential subscriber line charges until 1989, and asserts that special relief is therefore justified.[44] It proposes that jurisdictions with at least one-third Centrex lines should be exempted from the Centrex subscriber line charge increases, or, at a minimum, that these increases should be phased-in more gradually in such jurisdictions.[45] The D.C. PSC suggests, for example, a reduction in the scheduled Centrex subscriber line charge increases for District of Columbia customers by one-half until 1990.

22. Bell Atlantic supports the D.C. PSC's request for special treatment, noting that the D.C. PSC has made a strong case that the District of Columbia's special situation warrants a waiver.[46] By contrast, NATA and AT&T oppose the D.C. PSC's proposed relief, observing that the D.C. PSC has not raised any new arguments.[47] NATA states that the embedded Centrex subscriber line charge increases were based on Joint Board recommendations which were in turn based upon a proper record. NATA and AT&T further explain that the deviation between embedded Centrex subscriber line charges and the charges applied to residential and single-line business lines is not a new policy, but rather was published by this Commission as early as February 1984 -- long before the D.C. PSC adopted the rate measures which allegedly relied upon our initial statement that Centrex charges would stay at the same level as residential and single-line business charges.[48] NATA asserts that the D.C. PSC actually desires a perpetual exemption from the full subscriber line charge for embedded Centrex lines, and NATA opposes this result as contrary to our long-standing policy goal of achieving cost-based rates for interstate services. AT&T emphasizes that embedded Centrex lines already enjoy a generous transition plan, and that concerns about rate shock cannot justify perpetuating a non-cost-based pricing scheme forever. Finally, it challenges the assumption that charges for embedded Centrex lines in the District of Columbia will continue to increase, noting that the recently-adopted charge functions as a cap. AT&T observes that, according to the D.C. PSC's own figures on the relevant District of Columbia revenue requirement (the base factor portion), these charges would decline to3.79 in 1988, and decline again to3.55 in 1989.[49]

2. Discussion

23. We decline to modify our decisions on the level or timing of subscriber line charge increases as requested by petitioners.[50] The issues and concerns raised by the petitioners that challenge the scheduled increases were fully examined during the course of the Joint Board and Commission proceedings, and petitioners have provided no new arguments or data that warrant modifying our carefully considered approach.

24. These decisions were based upon the voluminous record developed in this proceeding. That record contains substantial amounts of data and information and numerous studies analyzing the impact of subscriber line charges on all of the four goals of the proceeding, including, and in particular, our universal service goal. Based upon this record, the Joint Board and this Commission concluded that the benefits flowing from the implementation of subscriber line charges had been achieved with no adverse impact on universal service. Indeed, the Joint Board noted that the record revealed that telephone subscribership had increased nationwide since implementation of subscriber line charges, and that the number of households without telephone service had declined.[51] Accordingly, we do not agree with those petitioners that claim again on reconsideration that these decisions are premature and that the Joint Board and this Commission did not adequately study the effect of subscriber line charges on universal service before proceeding with increases in those charges. The Joint Board dismissed these arguments in its *Recommended Decision*, concluding that sufficient time had passed to permit its review of subscriber line charges and further that there was nothing in the record to indicate that the existing charges had undermined universal service.[52]

25. Out of an abundance of caution, the Joint Board recommended phasing in the subscriber line charge increases in small incremental changes over a period of time. Moreover, as many parties recognize, pursuant to another Joint Board recommendation we have already responded to the concerns expressed by petitioners by implementing a monitoring program that is specifically designed to detect any future changes in penetration levels for telephone service.[53] Four reports that provide data in a number of areas have already been released as part of this monitoring effort.[54] Although the monitoring process is ongoing and the members of the Joint Board and this Commission will review the data in their entirety, preliminary information gathered regarding the effect of subscriber line charges appears to support the Joint Board and Commission conclusions. Indeed, the most recent data from the Census Bureau reveals that universal service is at a record high level with a nationwide telephone service penetration level of 92.9 percent as of March 1988, up from the 91.4 percent level of four years ago, before subscriber line charges were implemented. Moreover, the voluntary disconnect studies submitted to date by the BOCs and GTE as part of the monitoring process do not indicate that the increase in the subscriber line charge has had an adverse effect on the disconnection rate.[55]

26. This Commission is strongly committed to the principle of preserving universal service, and we will continue to monitor closely available data on telephone penetration levels to ensure that our policies are serving that goal. In addition to the ongoing monitoring program, this Commission has taken many actions that evidence our commitment to this goal. Two of the most notable actions in recent years are the high cost and lifeline assistance programs designed and implemented through the Joint Board process. These programs have been carefully targeted and refined by this Commission and the Joint Board to moderate the effects of high costs on certain users. The high cost assistance program permits LECs with higher than average costs to move additional revenue requirement to the interstate jurisdiction in order to keep local rates lower than they otherwise would be. The lifeline assistance programs have been designed to promote the availability of telephone service among low income groups, which have had subscribership levels below the national average.

27. This Commission has also recently taken two actions that are intended to further our continuing effort to achieve our goal of universal service. First, we established a new Rural Radio Service, known as Basic Exchange Telecommunications Radio Service, that is designed to make basic telephone service more accessible to rural households and businesses.[56] Second, on June 23, 1988, we adopted a notice of proposed Rule Making which asks the CC Docket No. 80-286 Joint Board for a recommendation on whether the eligibility rules for participation in the Link Up America Program should be amended to enable more low-income households to take advantage of this assistance program.[57]

28. The Joint Board and this Commission further found that the final proposed modest increases in subscriber line charges will continue to help promote economic efficiency, eliminate service pricing discrimination and deter bypass. The Joint Board *Recommended Decision* concluded that implementation of subscriber line charges has contributed to more cost-based telecommunications pricing, which has in turn produced such economic efficiencies as dramatic increases in network usage. This conclusion was drawn, in part, from data in the record showing a 40 percent overall reduction in the CCL rate since the implementation of subscriber line charges (much of which was directly attributable to those charges), and a substantial growth in interstate calling and use of switched access services in response.[58] In addition, studies in the record indicate that these gains have been, and will continue, producing general economic benefits such the creation of new jobs, and positive effects on the Gross National Product, price levels and the federal deficit.[59] The Joint Board also determined that reducing the CCL charges to bring those charges closer to the actual cost of providing service has already helped to eliminate service pricing discrimination and has reduced incentives for large users to bypass the public network.[60]

29. We reject the California and the D.C. PSC contentions that the subscriber line charge increases should not be implemented because, in certain low-cost jurisdictions, all or a majority of interstate NTS loop revenue requirements will be recovered by those charges, so that IXCs in those areas would pay less than their "fair share" of NTS costs.[61] These arguments were made and fully considered in the underlying proceeding.[62] The Joint Board recognized when it recommended the subscriber line charge increases that IXCs and end users would pay different proportions of NTS costs in different jurisdictions, but concluded that its recommendation regarding NTS cost recovery strikes the proper balance among all users of the switched network, and that the substantial portion of NTS loop costs the IXCs would be paying adequately addressed concerns in the record that IXCs pay a fair share of the interstate revenue requirement on a nationwide basis.[63] The Joint Board determined that the3.50 charge on a nationwide averaged basis was an appropriate level to achieve the benefits of its overall plan. As the *Recommended Decision* states, this level also leaves interexchange carriers with responsibility for recovering approximately 50 percent of the total interstate revenue requirement for costs incurred independently of the IXCs' usage of the exchange network. This 50 percent share is based on nationwide costs. An average nationwide cap is necessary to avoid a system that would require end users in high-cost areas to pay substantially higher subscriber line charges than customers in low-cost areas. Accordingly, the Joint Board declined to adopt alternatives, such as those advanced by the D.C. PSC, to the nationally averaged cap. In order to reduce subscriber line charges for residents of low-cost areas such as the District of Columbia as the D.C. PSC requests, we would be forced to raise charges substantially for subscribers in other, high-cost states. Such a result would not be desirable, and would undermine our goal of preserving universal service.

30. We disagree with NASUCA's allegations that the record on bypass effects does not justify the decision to increase subscriber line charges. That decision was not based solely upon bypass effects, but also reflects the other goals of this proceeding. Moreover, our conclusion that prices for telephone service that differ widely from the cost of those services provide incentives for bypass is fully supported by the record developed before the Joint Board.[64] We also do not agree with NASUCA's claim that our notice and comment procedures hindered the ability of parties to evaluate evidence. These procedures have been routinely and quite successfully used for non- adjudicatory matters at the federal level over many years, with greater efficiency than the oral hearing procedures NASUCA urges on us.[65] NASUCA has made no showing that the record in this proceeding is not adequate to make the type of policy decisions at issue here, or that we could gain any substantial benefit from oral cross-examination of witnesses in a hearing-type format.

31. NASUCA also criticizes the Joint Board and Commission monitoring program, suggesting that the program must be accompanied by affirmative findings of need for the increased subscriber line charges in order for it to be of any value.[66] As discussed above, the Joint Board and this Commission have made determinations based on a full and proper record regarding the level and timing of subscriber line charges. These decisions are inextricably tied to other aspects of the Joint Board and Commission orders. In particular, as the Joint Board noted, these actions are essential to the resolution of long-standing problems in the nationwide pooling of NTS costs. The increased subscriber line charge levels also permit the expanded lifeline assistance measures. Accordingly, the Joint Board recommended implementation of all aspects of the integrated plan, and this Commission adopted that recommendation. However, to ensure that no unexpected adverse effects flow from the plan, a comprehensive program has been designed and implemented to monitor relevant information. If the monitoring program reveals adverse effects, the Joint Board and this Commission have both made it clear that any necessary action will be taken in a timely fashion. Moreover, the monitoring program includes a 90-day review by the members of the Joint Board and this Commission in advance of the final two incremental increases. As a result, we see no need to change our previous findings. [67]

32. Finally, we decline to adopt the generalized proposals advanced by the Indiana Consumer Counselor and Tennessee that any savings resulting from recent federal tax law changes be somehow applied to reduce subscriber line charges.[68] The Joint Board was fully aware of the changes in the tax laws when it formulated its recommendations.[69] The LECs' annual access tariff filings reflect the changes that were implemented by the Tax Reform Act of 1986, and the Common Carrier Bureau took these factors into account in reviewing the rates proposed in the 1988 annual access tariff filings by the carriers and in ordering substantial reductions in the rates proposed.[70]

33. Similarly, the question of whether the LECs are in a position to "absorb" additional costs (because, for example, their cost of capital is less than expected) and still earn a fair return is a matter that is properly considered in a rate of return proceeding and not here.[71] The Part 69 access charge rules are based upon the premise that a rate of return will be established in other proceedings and will be used to compute access revenue requirements. Moreover, this Commission has just determined that it is appropriate to continue the LECs' currently-prescribed rate of return for a third year, noting that available evidence indicates that current overall cost of capital estimates are virtually the same as those existing when the current rate of return was set in 1986.[72] We accordingly do not consider that a showing has been made that the LECs are able to "absorb" additional costs and still earn a fair return.

34. We are aware that the District of Columbia has a significant number of Centrex lines, and we recognize the concerns expressed by the D.C. PSC about the possible effect on local rates if subscriber line charges for embedded Centrex lines reach6.00 in 1989. Indeed, such concerns prompted us to permit a substantial transition period for implementation of embedded Centrex subscriber line charges. We decline, however, to alter the level or schedule of embedded Centrex line charge increases in the District of Columbia as requested by the D.C. PSC.[73] We note that, contrary to the concerns expressed by the D.C. PSC, the record indicates that subscriber line charges for embedded Centrex lines should actually decrease in the District of Columbia in the years ahead because the level of these charges is capped by a company's actual loop costs, and the District's interstate assignment is declining due to its gradual move from a 44 percent to a 25 percent NTS interstate allocator.[74] Both of these factors reduce the maximum level of NTS costs which can be recovered through the subscriber line charge. According to the estimate provided in the D.C. PSC's petition, the base factor portion of NTS costs for access lines in the District of Columbia will be3.55 in 1989.[75] Since embedded Centrex subscriber line charges are "capped" at the level of the base factor portion of NTS costs under our Rules,[76] under the D.C. PSC's estimates these charges would be approximately3.55 in 1989 when the second and third increases have taken effect. Assuming this is the case, further increases in the embedded Centrex cap to5.00 and6.00 will not have any effect in the District of Columbia. This reduced interstate assignment should greatly alleviate the concern that the prospect of significant subscriber line charge increases will induce customers to abandon Centrex for similar PBX-based services.[77]

B. Allocation of Decreases in the Carrier Common Line Charge

1. Background

35. Our Rules originally provided that costs allocated to the CCL element would be recovered through a uniform charge assessed on both originating and terminating switched access minutes.[78] In CC Docket No. 86- 1, however, we adopted temporary measures to reduce some of the incentives for uneconomic bypass inherent in the existing cost recovery system pending a permanent solution to the NTS cost recovery issues.[79] Our Docket 86-1 *WATS Order* froze the terminating CCL charge at its then-existing level of 4.33 cents per minute of use in order to permit the originating rate to be reduced by various common line cost reductions. In this way, we sought to minimize incentives for uneconomic bypass on the originating end, where we found it the most technologically feasible. We recognized, however, that loading the CCL costs onto terminating minutes could eventually shift the focus of bypass efforts from the originating to the terminating end. Accordingly, we originally provided that this "bifurcated" CCL arrangement would expire on December 31, 1987.

36. The Joint Board's *Recommended Decision* also reflects concerns regarding bypass on the originating end. Thus, it recommended that LECs be directed to use the revenues from the July 1987.60 increase in the subscriber line charge to reduce the originating CCL charge.[80] In addition, the *Recommended Decision* proposed extension of the expiration date for the bifurcated charge until the effective date of the second subscriber line charge increase.

37. We accordingly extended the temporary bifurcated charge approach through November 30, 1988.[81] Pursuant to the terms of our *Order*, on May 1, 1987, NECA filed tariff revisions that used the revenues from the initial.60 subscriber line charge increase to reduce the originating CCL charge. As a result, the originating CCL charge was lowered to .69 cents per minute, while the terminating end CCL charge remained at 4.33 cents per minute. The originating charge was further reduced when the LECs' 1988 access tariffs took effect on January 1, 1988, and now stands at zero. These access tariff filings also slightly reduced the terminating end CCL charge, which is presently 4.14 cents per minute.[82] We also amended our Rules to provide for a continuation of the bifurcated CCL charge through November 30, 1988.

2. Positions of the Parties

38. MCI petitions this Commission to require that the decrease in the CCL charges resulting from the July 1987 subscriber line charge increase be applied equally to both originating and terminating minutes. According to MCI, we conducted no independent analysis of this issue, instead relying upon Joint Board findings which are, in MCI's view, based upon record evidence that is stale and unreliable.[83] MCI further notes that this Commission's initial decision to "freeze" the terminating charge at 4.33 cents in the March 1986 *WATS Order* was intended to be a temporary measure, not a long-term solution.[84] MCI charges that, since costs do not vary with the directionality of use, this approach discriminates against carriers that do not have equal numbers of originating and terminating minutes.[85]

39. Ad Hoc, ADAPSO and Ameritech support MCI's request and endorse MCI's arguments. In addition, these parties emphasize that allocation of the July 1987 CCL decrease only to originating minutes will not provide further protection against bypass, but may instead encourage the development of bypass on the termininating end, which, they assert, is becoming increasingly feasible due to recent technological developments.[86] Ad Hoc and ADAPSO claim that the differential between CCL charges on the two ends is unreasonably discriminatory, particularly as it affects users of WATS and 800 Services.[87]

40. Bell Atlantic, NYNEX, Southwestern Bell, US West and USTA oppose the MCI petition, noting that the current approach is consistent with the *WATS Order* and with the fact that bypass is more likely on the originating end.[88] Southwestern Bell notes that, although the threat of

terminating bypass is a legitimate concern, our decision to reduce the originating charge faster than the terminating charge rests on the sound theoretical basis that originating access bypass remains easier than terminating bypass because:

> (1) customers cannot control which IXC handles their incoming calls, and thus it is more difficult to concentrate terminating traffic; (2) IXCs need the technological capability of ten-digit translation to route terminating traffic to a bypass facility; and (3) IXCs can more easily provide incentives (such as reduced rates) to customers engaged in originating bypass since a customer involved in terminating end bypass is not the entity paying for the call.

3. Discussion

41. We decline to adopt MCI's proposal that we require LECs to apply the decrease in the CCL charges resulting from the July 1987 subscriber line charge increases equally to originating and terminating minutes. Both our original decision in our *WATS Order*, which first established the bifurcated approach to CCL charges, and our decision in this proceeding, which, in effect, continued that approach for a further period, are based on a proper record regarding the incentives and likelihood of bypass. As several commenters observe, at least for the near term, the technological configuration of the network and available economic incentives combine to create circumstances in which originating end bypass remains more feasible than terminating end bypass.[89] Accordingly, it was appropriate to require LECs to apply the initial reduction in the CCL charge resulting from the subscriber line charge increase exclusively to the originating end so that the lower originating charge might deter bypass and foster increased originating switched minutes of use. MCI and parties who support the MCI suggestion have not provided any new arguments or evidence which demonstrate that this approach does not continue to serve its intended purpose of deterring bypass, or that this interim arrangement unreasonably discriminates against certain carriers or users.

42. This is not to say that we are unconcerned about the differential between the originating and terminating charges and its implications for terminating end bypass. As several commenters note, a relatively high terminating CCL charge creates substantial incentives to resort to terminating bypass, and there are no technological impediments to the development of long-term terminating bypass alternatives.[90] There is, however, nothing in this record or in the record in the underlying proceeding to indicate that the continuation of the higher terminating CCL charge for a short time will produce terminating bypass to an extent that would warrant reversing the decision to apply the first.60 of the subscriber line charge increases to originating CCL charges.

43. While we reject its petition, MCI and the various parties supporting its position are clearly correct in arguing that this Commission never intended that the bifurcated approach for CCL charges continue indefinitely. As we indicated when adopting bifurcated CCL charges in CC Docket No. 86-1, we viewed this approach as an "interim step" pending establishment of a permanent approach to common line cost recovery that would provide a long-term solution to the bypass problem, as well as achieve the other goals of our access charge plan.[91] Indeed, there always has been an expiration date attached to this Rule provision, which at present, in conformance with the Joint Board's *Recommended Decision*, is the day before the second subscriber line charge increase is scheduled to be implemented.[92] However, in order to avoid unnecessary rate churn and to minimize incentives for originating end bypass prior to implementation of the final components of our plan for common line cost recovery, we have concluded that the expiration date for the system of bifurcated CCL charges should be deferred at least until March 31, 1989.[93] We will use this time to invite and analyze comment on an appropriate schedule for terminating bifurcated CCL charges.

44. Although this will extend the bifurcated system of CCL charges for an additional period of time, we consider that this is the best course available to us, and should not result in undue incentives for terminating end bypass in the short term. We note that since the originating charge was recently reduced to zero, future reductions to the CCL charge prior to equalization of the charges will be applied to decrease the terminating end charge. This should help address concerns about the level of the terminating end CCL charge until the charges are equalized. We are concerned that elimination of bifurcation on the presently scheduled date would mean that the originating CCL charge would increase (from its present level of zero) for a brief period, only to decrease again on April 1, 1989, when tariffs flowing through the benefits of the final subscriber line charge increase become effective. This could produce unnecessary rate churn for access customers. Moreover, retaining bifurcated charges for a longer period would reduce the incentive for originating bypass during this interim period prior to completion of the cost recovery plan, and reestablishing the uniform charge on or after April 1, 1989, should not have significant deleterious effects in terms of originating bypass because the CCL charge overall will be substantially lower due to the full3.50 subscriber line charge recovery.

45. As was noted above, the current system of bifurcated CCL charges was intended only as an interim step pending establishment of a permanent common line cost recovery program that would further the goals of our access charge plan. With implementation of the final subscriber line charge increases and the pooling modifications on April 1, 1989, that program will be in place. As a consequence, it is appropriate at this time to consider whether there are compelling reasons to retain the interim measure of bifurcated charges for an additional period of time, or whether equalized charges should be reinstituted in the near future. We believe that, in the long term, equalized charges have significant advantages over bifurcated rates. For example, as was noted above, bifurcated charges have created implementation problems for certain new services, such as 800 services that use a common line connection on each end.[94] Several parties also note that, if a substantial differential between originating and terminating charges is continued for a long period, users and service providers will have substantial incentives to develop terminating bypass alternatives.[95] In addition, we are concerned that, if carriers that leave the common line pool in April 1989 have bifurcated rates, access charges associated with a call between two areas with different NTS costs would vary, potentially substantially, depending on the area in which the call originates. This could distort traffic flow between regions, which could in turn lead to greater discrepancies in CCL rates and increased pressure to deaverage toll rates. Finally, we are concerned that, for

ratemaking purposes, it is more complicated and may be less reliable to administer and review separate estimates of originating and terminating minutes of use, particularly when the originating rate is set at zero.

46. For these reasons, we continue to believe that a system of equalized charges is superior to the interim bifurcated rate approach we have been using. We recognize, however, that the system of bifurcated rates has some beneficial effects that could lead us to retain this approach for a period of time even after the permanent common line cost recovery program is in effect. Bifurcated rates can reduce the incentives for originating end bypass, and they may have helped LECs encourage IXCs to provide originating service in their areas. We accordingly request comment regarding the extension of the use of bifurcated rates past March 31, 1989, and the proper date to reinstitute equalized CCL charges.[96]

IV. RESTRUCTURING OF THE NTS POOL

A. The Affiliate Withdrawal Requirement

47. The Joint Board's *Recommended Decision* provided much-needed changes in the present common line pooling arrangements. These modifications were designed to bring fundamental yet cautious reforms to the present pooling system. The reforms are cautious in that the Joint Board declined to adopt proposals of several-years standing that the Commission eliminate the pooling mechanism altogether.[97] The Joint Board instead opted for reform patterned on a plan submitted by LEC industry groups representing exchange carriers "which serve more than 99% of this country's local exchange access lines.[98] The specific Joint Board recommendations proposed that carriers be permitted to leave the common line pool under certain conditions. The conditions suggested by the industry groups include the "all-or nothing" affiliate withdrawal requirement that carriers who choose to leave the pool and file their own CCL rates remove all their study areas, and that departing holding companies remove all their affiliated companies. The Joint Board reasoned that to provide otherwise would likely cause LECs to remove only their low-cost study areas while leaving high-cost areas in the pool, and might establish improper incentives relating to the allocation of common costs between study areas in the pool and those that are withdrawn. It concluded that these results would diminish or even defeat the benefits to be gained from the pooling modifications.[99] This Commission adopted these Joint Board recommendations.[100]

48. Contel asks us to rescind this "all-or-nothing" condition for withdrawal from the common line pool or, at a minimum, to apply the requirement only to larger holding companies with predominately low-cost LECs. According to Contel, this affiliate withdrawal standard lacks a rational basis. Contel further claims that the affiliate withdrawal standard will create pressure to average the rates of all LECs of a withdrawing holding company, which, it claims, contradicts this Commission's goal of moving toward cost-based rates.[101] Contel also disputes the stated concerns that, if the affiliate withdrawal standard were changed, LECs would withdraw only low-cost study areas or improperly allocate common costs among study areas.[102] Finally, Contel contends that this standard fails to recognize the significant differences among LECs owned by a single holding company, and is inconsistent with other Commission decisions and regulatory requirements that treat holding company LECs as individual companies.[103]

49. The commenting parties that address this issue uniformly oppose Contel's proposal. Ameritech characterizes the request as Contel's attempt to obtain a strategic advantage for its high-cost areas "in perpetuity".[104] Bell Atlantic and Southwestern Bell emphasize that the affiliate withdrawal requirement is a fundamental element of the Joint Board's pooling modifications, and that any change in this standard would significantly alter the financial operation of the pool and could jeopardize the effectiveness of the changes to the current pooling structure.[105] Southwestern Bell observes that Contel's approach would expand the support obligations of companies exiting the pool beyond the contemplated level, causing these LECs to move further away from cost-based rates and a more independent economic status. NYNEX asserts that Contel provides no new argument warranting reconsideration, and notes that withdrawing LECs will have the flexibility to file access tariffs on either a holding company or study area basis under the affiliate withdrawal standard, and will not need to average rates based on their company or individual study area average costs.[106]

50. We decline to alter the pool withdrawal conditions as requested by Contel. The Joint Board originally recommended the affiliate withdrawal approach, and this Commission subsequently adopted it, because this requirement was deemed essential to the success of the pooling modifications. A principal benefit of the pooling changes is that they will enable companies to leave the pool under conditions that will bring them flexibility to charge CCL rates more closely tied to their own costs than would be possible in the mandatory pool, and, thus, increased incentives to reduce their costs and improve the efficiency of their operations.[107] These advantages are possible because the new pooling framework was carefully designed to modify and reduce support flows among unaffiliated companies by encouraging the LECs that are able to leave the pool to take their high-cost (pool flow receiver) companies out of the pool. At the same time, the modifications allow LECs to remain in the pool if they choose to continue to enjoy the benefits of cost, risk and resource sharing afforded by their participation in the NECA CCL tariff.[108]

51. Under this revised pooling structure, a holding company with high-cost LECs has a variety of options. If such a company determines that leaving the pool is the optimal course for the company and its affiliates, it can choose between different approaches. Once it leaves the pool, the holding company may either aggregate its companies for purposes of filing an interstate common line tariff, or it may file a tariff for each individual company (or study area).[109] Alternatively, if the holding company decides that the best path for its companies is to remain in the pool, that option also remains available.

52. A holding company's decision will be shaped by many variables, including the means available to it to protect its high-cost companies from suffering a significant adverse impact from a decision to leave the common line pool. For example, if a company that decides to leave the pool opts to have all its LECs participate in a single interstate common line tariff and rate, this would relieve its companies from the administrative burdens of filing individual tariffs. In addition, this approach would reduce disparities among individual company CCL rates and enable an affiliated LEC with higher than average costs to

lower what could otherwise be a particularly high CCL rate outside the pool by participating in a single, averaged CCL rate charged by all its affiliates.[110] Alternatively, a company may decide that considerations such as the availability of transitional support payments[111] would keep CCL charges at a reasonable enough level that it is in its broader corporate interest for all its affiliates to file individual common line tariffs outside the pool. Such a choice may also be influenced by the fact that holding companies have the ability and the incentive to minimize tariff burdens on individual companies by using common tariff methodologies, rate structures, and terms and conditions, as well as developing and sharing among its affiliates expertise and other resources needed for tariff preparation. All of these factors help ensure that a holding company that decides to take advantage of the additional rate flexibility and more cost-based pricing available to it outside the pool is able to do so in a way that will enable both its low- and high-cost LECs to enjoy benefits in the new pooling framework.[112]

53. We acknowledge that Contel has raised some valid questions regarding the pooling approach we have adopted. However, most of these concerns were expressed and addressed during the course of the underlying proceeding. Thus, we understood when we adopted the common line pooling modifications that our approach would have certain drawbacks, as Contel argues, but we concluded that, on balance, it was necessary for us to establish an affiliate withdrawal requirement if the full benefits of the pooling modifications were to be realized. Without this requirement, holding companies would have clear incentives to take advantage of this flexibility by removing their low-cost companies and leaving their high-cost companies in the pool.[113] As the Joint Board observed when addressing this issue before, this result would likely bring only administrative changes to the current pooling arrangement because the long term support flows would approach existing pool flows, and would thus compromise one of the key aspects of the pooling modifications.[114] Contel has provided no information that alters our conclusion that, given the strong incentives, holding companies would be likely to withdraw only their low-cost study areas or companies from the pool if given the choice, and that this result would significantly reduce the potential benefits we expect to flow from the pooling modifications we have adopted. We also remain concerned that Contel's approach might establish incentives for LECs to allocate costs improperly among study areas according to whether they remain in or withdraw from the pool.[115]

54. As Contel has observed, this Commission does treat LECs affiliated with a holding company in the same manner as unaffiliated LECs in some situations.[116] We find, however, that it is rational and lawful for us to apply certain requirements to all the affiliates of a holding company (as in fashioning the affiliate withdrawal rule) whenever this approach is necessary to achieve significant public interest benefits. As discussed above, the Joint Board specifically examined options for companies such as Contel that may have both high- and low-cost companies, and decided to recommend the pooling modifications, which include the affiliate withdrawal requirement, that were subsequently adopted by this Commission.[117] We recognize that, with this requirement, a high-cost company that is affiliated with a holding company may have to leave the pool based on a decision by its holding company, whereas a similar unaffiliated high-cost company might opt to remain in the pool. We also recognize that a low-cost LEC may not be able to charge its low CCL rate if its non-pooling holding company files a single tariff that averages the CCL rate on a holding company basis. However, in making such a determination, a holding company obviously has the incentive to take the interests of both its high- and low-cost affiliates into account, and, as was noted above, has tools at its disposal to ensure that its choice will serve the interests of all its affiliates.[118] More importantly, the Joint Board and this Commission concluded that this approach is necessary to the overall success of the pooling modifications.[119] Unless "net recipients" leave the pool, low-cost companies would have little incentive to withdraw since their mandatory LTS payments could easily equal their current pool contributions. This would make our depooling efforts a "hollow" exercise and would undermine our goal to increase rate flexibility and to provide greater incentives to reduce costs and improve the efficiency of operations that LECs will experience from the pooling modifications.[120]

55. Contel also offers the vague alternative suggestion that the affiliate withdrawal standard be applied only to the "larger holding companies with predominately low cost LECs.[121] Contel does not explain how its proposal would be implemented, or where it would draw the line between holding companies that have and those that do not have predominately low- cost LECs. Furthermore, it is apparent that such an approach would do little to address the concern that, in order to obtain the benefits of the pooling modifications, large net recipients must leave the pool.[122] To the extent that Contel is asserting that it is somehow sufficiently different from other holding companies to warrant unique treatment, we do not find support for such a conclusion in this record.

56. We reiterate that the decision on whether to leave or remain in the pool is a voluntary one. The Joint Board and this Commission considered various suggested modifications to the proposed pooling arrangements, and concluded that any such modifications that caused significant changes in the relative dollar flows in a depooled environment could upset the delicate balance reflected in the plan and undercut our expectations that a sufficient number of carriers will elect to leave the pool. This could ultimately cause the entire regulatory scheme to unravel. The modification proposed by Contel is just such a significant change.

57. Finally, we wish to address in this context the recent court decision in *ALLTEL Corporation v. FCC, United States and NECA*, Nos. 86-1639, 86-1654, 87-1749 & 87-1802 (D.C. Cir. Feb. 5, 1988). In this case, decided after the close of the pleading cycle in this reconsideration proceeding, the United States Court of Appeals for the District of Columbia Circuit reversed a decision of this Commission because it found that we had not adequately explained our reliance on company affiliation in certain rules relating to average schedule companies that were before that Court on review. We have carefully reviewed this decision to ensure that the affiliate withdrawal rule we adopted in the context of the pooling modifications is consistent with the Court's ruling, and have concluded that our reasons for establishing this requirement meet the concerns raised in the *ALLTEL* opinion. As the text above explains in more detail, the Joint Board and this Commission have determined that the affiliate withdrawal requirement is necessary to achieve the public interest benefits of the modified pooling arrangement we have

adopted. As also indicated above, we consider that a requirement that takes affiliation into account in this context is appropriate because of the net public interest benefits and the likelihood that a LEC affiliated with a holding company is better situated to enjoy many of the benefits to be gained by leaving the common line pool than an unaffiliated LEC.[123]

58. We also note that, while in the *ALLTEL* case the effect of our affiliate rule was to require certain companies to relinquish their average schedule status (because they were affiliated with companies that, as a result of other rules, were ineligible for average schedule treatment)[124], we are not requiring Contel to change the status of any of its companies vis-a-vis the pool. It is free to remain in the pool and take advantage of the benefits the pool provides, or, it can opt to leave the pool. Our rule only requires that, if Contel chooses to take advantage of the new flexibility we have made available to it by permitting it to leave the pool, it make a consistent choice for all of its companies.

B. Definition of Level I Companies

59. We provided two opportunities for carriers to leave the pool and still qualify to receive transitional support. The larger (Level I) companies must leave the pool April 1, 1989, in order to qualify for this support, while the smaller (Level II) companies are permitted a second opportunity – in January 1990 – to leave the pool and receive transitional support.[125]

60. ALLTEL Corporation, CP National Corporation and Telephone & Data Systems, Inc. (Joint Petitioners) ask us to resolve uncertainty about the definition of Level I companies that derives from an inconsistency between the language of the Joint Board's *Recommended Decision* and the text of the Rules attached to the Joint Board and Commission orders. As the Joint Petitioners observe, the *Recommended Decision* states that companies that own or control more than 300,000 access lines and have in excess of 150 million in annual operating revenues would be considered to be the larger Level I companies.[126] The Joint Petitioners note that the text of the Rules adopted in both the Joint Board *Recommended Decision* and in the Commission *Order*, however, appears to place companies that meet either the 300,000 lines or150 million criterion into the Level I category.[127] The Joint Petitioners emphasize that the consequence of this discrepency is that those companies that would be Level II companies under the language of the *Recommended Decision*, but fall into Level I under the text of the Rules, are deprived of the second opportunity to leave the NTS pool and still qualify for transitional support that remains available to Level II companies. In addition to their specific request relating to the Level I dividing line, Joint Petitioners also express a more general concern that the access lines/annual revenues criteria are too broad, and will sweep companies into Level I that were not intended to be included in that category. To remedy this problem, the Joint Petitioners suggest that we list in our Rules as Level I companies only those companies identified in the industry's Joint Comments.[128]

61. USTA supports the Joint Petitioners' request concerning the dividing line between Level I and Level II companies. It also supports the grouping of Level I companies listed in the industry's Joint Comments, noting that this listing is consistent with the objectives of the *Order* and maintains maximum flexibility for the affected LECs.[129] NYNEX, on the other hand, opposes the Joint Petitioners' proposals. It asserts that the Rules defining Level I and Level II companies should not be changed because the data on withdrawal from the pool relied upon by the Joint Board was consistent with the definitions actually adopted, and claims the requested change should result in unforseen delay in withdrawal from the pool by net recipient LECs.[130] In reply, the Joint Petitioners dispute NYNEX's allegations, and emphasize that the data on the effects of withdrawal from the pool in the record were based on the assumption that only the companies listed in the Joint Comments would be categorized as Level I companies. [131]

62. We agree with the Joint Petitioners that the language of the Rules should be revised to include only companies with more than 300,000 access lines and in excess of150 million in annual operating revenues in the Level I category.[132] This adjustment is consistent with the intention of the Joint Board and this Commission to accord smaller companies additional flexibility in making a decision on whether to leave the pool while still qualifying for transitional support.[133] We do not, however, grant Joint Petitioners' request that Level I companies be defined to include only those companies listed in the industry's Joint Comments.[134] Such an approach would require us to distinguish among companies based upon a list submitted by industry representatives, rather than upon objective size criteria, and would raise troublesome discrimination concerns. Moreover, the Joint Petitioners have not indicated which, if any, specific companies would be adversely affected by a decision to retain the access lines/revenues criterion as adjusted in this order,[135] and we are not persuaded that the record shows any need to revise this standard further.

V. TECHNICAL ADJUSTMENTS TO THE RULES

A. Lifeline Assistance Funding Mechanism

63. NECA proposes a minor adjustment to our Rules regarding the administration of the federal lifeline assistance program. Specifically, it requests that the methodology used in Section 69.104(l) of our Rules to determine the projected cost of the subscriber line charge waiver assistance be revised to incorporate the same type of "resizing" mechanism that is utilized for the Link Up America connection assistance expense adjustment in Section 67.741(b). NECA states that both lifeline assistance funding mechanisms are based on projections. Section 67.741(b) provides a mechanism to resize the Lifeline Connection Assistance expense adjustment based on reporting of actual data from the prior period to reflect any over- or under-recovery during that period. Section 69.104(l) contains no such mechanism for adjustment of the End User Common Line Lifeline Assistance revenue requirement. NECA suggests that a resizing mechanism be incorporated into Section 69.104(l) to adjust the projected revenue requirement to reflect the actual benefits paid in the previous period.[136] Several commenters support NECA's suggestion, and none oppose it.[137]

64. We conclude that the revision proposed by NECA would make the subscriber line charge waiver funding mechanism more efficient and accurate, and would avoid any adverse impact on either exchange carriers or IXCs caused by an under- or over- projection of the revenue requirement. We accordingly adopt the proposal to incor-

porate a mechanism in Section 69.104(l) of our Rules that would adjust the projected End User Common Line Lifeline Assistance revenue requirement to reflect the actual benefits paid in the previous period.[138]

B. Schedule for Collection of Presubscribed Lines Data

65. As part of the restructuring of the common line pool, effective April 1, 1989, LECs will recover costs associated with the federal lifeline and universal service fund assistance programs through flat rate charges to IXCs, administered by NECA and based on the number of access lines "presubscribed" to the IXC. In order to permit NECA to administer this program, the Rules provide that the LECs must submit certain data regarding the number of lines presubscribed to the different IXCs on a designated schedule.[139]

66. NECA requests two changes in the schedule for the collection of presubscribed lines data from carriers. First, NECA asks that the January 2nd annual filing date for such data specified in Sections 69.116(c) and 69.117(c) be modified to coincide with the December 30th filing date specified in Section 36.612(a) for optional updates to the universal service fund. NECA represents that this change would enable it to collect the information required by these sections in a single data submission, which would promote the efficient collection and processing of the data.[140] Second, NECA requests that we change the date for the initial collection of the presubscribed lines data described in Sections 69.116(c) and 69.117(c) from January 2, 1989, to December 30, 1987. NECA claims that this revision is necessary to permit sufficient time to develop a system for billing the IXCs, and would also enable NECA to build an historical data base that will increase the accuracy of the billing system when it goes into operation on April 1, 1989.[141] The only party to comment on either of these requests is USTA, which supports the NECA proposals because they will help control costs, improve administration, and facilitate accurate rate development by NECA.[142]

67. We adopt NECA's first request that the annual filing date for presubscribed lines data in Sections 69.116(c) and 69.117(c) be changed from January 2nd to December 30th to conform to the filing date for optional updates of universal service fund data set forth in Section 36.612(a) of our Rules. This modification will promote more efficient collection and processing of the data by NECA. We also agree with NECA that it is appropriate to set an earlier date for the initial submission of presubscribed lines data, but we do not consider it necessary to require that this data be provided before June 1988. Because the new billing system will not be implemented until April 1, 1989, an August 1, 1988, commencement date for the submission of presubscribed lines data will afford NECA adequate time to develop a workable billing system.[143]

68. For purposes of the non-restricted notice and comment proceeding being initiated as part of this decision, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period.[144] The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding.[145]

69. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present.[146] Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inculsion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretry has been served, and must also state by docket number the proceeding to which it relates.[147]

70. The actions contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.[148]

VI. ORDERING CLAUSES

71. IT IS HEREBY ORDERED, that, pursuant to 47 U.S.C. §§ 154(i) and (j), 201, 202, 203, 205, 403, 405, and 410 and 5 U.S.C. § 553, the petitions for reconsideration filed in this proceeding ARE DENIED, except as provided herein.

72. IT IS FURTHER ORDERED, that the rule modifications contained in Appendix B are ADOPTED.

73. IT IS FURTHER ORDERED, that the Petition for Rule Making filed by the Utility Consumer Counselor of Indiana on June 18, 1987, is DENIED.

74. IT IS FURTHER ORDERED, pursuant to the procedures set forth in Section 1.415 of our Rules, that all interested parties may file comments no later than August 26, 1988, relating to how long we should continue bifurcated carrier common line charges prior to returning to equalized charges. Replies are to be filed no later than September 23, 1988. In accordance with the provisions of Section 1.419 of our Rules, an original and five copies of all statements, briefs, comments, or reply comments shall be filed with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. All such filings will be available for public inspection in the Docket Reference Room at the Commission's Washington, D.C. offices.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX A

PARTIES FILING PETITIONS FOR RECONSIDERATION

ALLTEL Corporation, CP National Corporation, and Telephone & Data Systems, Inc. (Joint Petitioners)

People of the State of California and the Public Utilities Commission of the State of California (California)

Contel Corporation (Contel)

MCI Telecommunications Corporation (MCI)
National Association of State Utility Consumer Advocates (NASUCA)

National Exchange Carrier Association, Inc. (NECA)

Public Service Commission of the District of Columbia (D.C. PSC)

Tennessee Public Service Commission (Tennessee)

Utility Consumer Counselor of Indiana (Indiana Consumer Counselor)

PARTIES FILING OPPOSITIONS

ADAPSO
AD Hoc Telecommunications Users Committee (Ad Hoc)

Ameritech Operating Companies (Ameritech)

American Telephone and Telegraph Company (AT&T)

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Corporation and the BellSouth Telephone Companies, South Central Bell Telephone Company and
Southern Bell Telephone and Telegraph Company (BellSouth)

New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)

The North American Telecommunications Association (NATA)

Southwestern Bell Telephone Company (Southwestern Bell)
The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West)

United States Telephone Association (USTA)

United Telephone Systems Companies (UTS)

PARTIES FILING REPLIES

Ad Hoc
Joint Petitioners
Contel
Indiana Consumer Counselor
MCI
D.C. PSC

APPENDIX B

Part 69 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 69 - ACCESS CHARGES

1. The authority citation for Part 69 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 69.2 is revised to read as follows:

§ 69.2 Definitions.

* * * * *

(hh) Level I Contributors - Telephone companies that are not association Common Line tariff participants, file their own Common Line tariffs effective April 1, 1989, and had a lower than average Common Line revenue requirement per minute of use in 1988 and thus were net contributors (i.e had a negative net balance) to the association Common Line pool in 1988.

(ii) Level I Receivers - Telephone companies that are not association Common Line tariff participants, file their own Common Line tariffs effective April 1, 1989, and had a higher than average Common Line revenue requirement per minute of use in 1988 and thus were net receivers (i.e. had a positive net balance) from the association Common Line Pool in 1988.

(jj) Level II Contributors - A telephone company or group of affiliated telephone companies with fewer than 300,000 access lines or less than150 million in annual operating revenues that is not an association Common Line tariff participant, files its own Common Line tariff effective January 1, 1990, and that had a lower than average Common Line revenue requirement per minute of use in 1988 and thus was a net contributor (i.e., had a negative net balance) to the association Common Line pool in 1988.

(kk) Level II Receivers - A telephone company or group of affiliated telphone companies with fewer than 300,000 access lines or less than150 million in annual operating revenues that is not an assocation Common Line tariff

participant, files its own Common Line tariff effective January 1, 1990, and that had a higher than average Common Line revenue requirement per minute of use in 1988 and thus was a net receiver (i.e. had a positive net balance) from the association Common Line pool in 1988.

* * * * *

3. Section 69.104 is revised to read as follows:

§ 69.104 End user common line.

* * * * *

(l) In connection with the filing of access tariffs pursuant to Section 69.3(a), telephone companies shall calculate for the association their projected revenue requirements attributable to the operation of Sections 69.104 (j) through (k). The projected amount will be adjusted by the association to reflect the actual lifeline assistance benefits paid in the previous period. If the actual benefits exceeded the projected amount for that period, the differential will be added to the projection for the ensuing period. If the actual benefits were less than the projected amount for that period, the differential will be subtracted from the projection for the ensuing period. The association shall so adjust amounts to the Lifeline Assistance revenue requirement, bill and collect such amounts from interexchange carriers pursuant to Section 69.117 and distribute the funds to qualifying telephone companies pursuant to Section 69.603(d).

4. Section 69.116 is revised to read as follows:

§ 69.116 Universal service fund.

Effective August 1, 1988:

(a) A charge that is expressed in dollars and cents per line per month shall be assessed beginning on April 1, 1989, upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services and that have at least: (1) one percent of the total common lines presubscribed to interexchange carriers in all study areas; or (2) five percent of the presubscribed lines in any study area and a minimum of one thousand presubscribed lines in that study area.

(b) The charge shall be computed by the association on a semi-annual basis by dividing one-twelfth of the projected annual Universal Service Fund revenue requirement by the total number of common lines presubscribed to interexchange carriers defined in Section 69.116(a). Beginning on April 1, 1989, the association shall bill and collect the charge, and disburse associated revenue, on a monthly basis pursuant to Section 69.603(c).

(c) Telephone companies shall provide the association the data necessary to compute the charge. These data shall include the number of presubscribed common lines in each study area and the number of those lines associated with each interexchange carrier serving that study area. In a study area served by a single interexchange carrier, all common lines shall be considered as presubscribed to that interexchange carrier. Information concerning presubscribed common lines shall be filed with the assocation on June 30 and December 30 of each year, except for the first such submission, containing presubscribed common line data calculated as of December 31, 1987, which shall be filed on August 1, 1988. Presubscribed common line data filed on June 30 shall be calculated as of December 31 of the preceding year, and presubscribed common line data filed on December 30 shall be calculated as of June 30 of the same year.

5. Section 69.117 is revised to read as follows:

§ 69.117 Lifeline assistance.

Effective August 1, 1988:

(a) A charge that is expressed in dollars and cents per line per month shall be assessed beginning on April 1, 1989, upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services and that have at least: (1) one percent of the total common lines presubscribed to interexchange carriers in all study areas; or (2) five percent of the presubscribed lines in any study area and a minimum of one thousand presubscribed lines in that study area.

(b) The charge shall be computed by the association on a semi-annual basis by dividing the sum of one-twelfth of the projected annual Lifeline Assistance revenue requirement and one-twelfth of the projected annual revenue requirement calculated by all telephone compnies pursuant to Section 69.104(1) by the number of common lines presubscribed to interexchange carriers defined in Section 69.117(a). Beginning on April 1, 1989, the association shall bill and collect the charge, and disburse associated revenue, on a monthly basis pursuant to Section 69.603(d).

(c) Telephone companies shall provide to the association the data necessary to compute the charge. These data shall include the number of presubscribed common lines in each study area and the number of those lines associated with each interexchange carrier serving that study area. In a study area served by a single interexchange carrier, all common lines shall be considered as presubscribed to that interexchange carrier. Information concerning presubscribed common lines shall be filed with the association on June 30 and December 30 of each year, except for the first such submission, containing presubscribed common line data calculated as of December 31, 1987, which shall be filed on August 1, 1988. Presubscribed common line data filed on June 30 shall be calculated as of December 31 of the preceeding year, and presubscribed common line data filed on December 30 shall be calculated as of June 30 of the same year.

6. Section 69.207 is revised to read as follows:

§ 69.207 Interim Carrier Common Line Charges.

Notwithstanding Sections 69.203 and 69.205, the transitional premium charges for the Carrier Common Line element shall be computed in accordance with this section during the period commencing June 1, 1986, and concluding March 31, 1989. For purposes of this section, the term "open end" of a call refers to the origination or termina-

tion of a call that utilizes exchange carrier common line plant. (A call can have no, one, or two open ends). The transitional premium charges for the Carrier Common Line element shall be expressed in dollars and cents per access minute. The charge shall be 4.33 cents per premium minute for: (i) All terminating premium minutes on calls with two open ends (*e. g.*, an MTS or OCC MTS-type call); and (ii) all open end premium minutes on calls with one open end (*e. g.*, a WATS, OCC WATS-type or FX call). For purposes of this section, the term "originating- II minutes" refers to originating minutes on calls with two open ends. The charge on premium originating-II minutes shall be computed by subtracting the sum of the projected revenues generated from (i) the 4.33 cents per minute premium charge described above and (ii) the corresponding non-premium charge, from the carrier common line revenue requirement and dividing the remainder by the sum of the projected premium originating-II minutes and a number equal to .45 multiplied by the projected non-premium originating-II minutes. For purposes of this section, if the calculations described above result in a negative per minute charge on originating-II minutes, such charge shall be adjusted to equal .00 cents, and the charge of 4.33 cents on terminating minutes shall be lowered accordingly.

FOOTNOTES

[1] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Report and Order*, 2 FCC Rcd 2953 (1987) (hereinafter *Order)*.

[2] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Recommended Decision and Order*, 2 FCC Rcd 2324 (1987) (hereinafter *Recommended Decision)*.

[3] 47 C.F.R. § 69.1, *et. seq.* (1987).

[4] In this Order, we describe a petition for full or partial reconsideration as a "petition," a pleading filed in opposition or response to a reconsideration petition as an "opposition," and a pleading filed in response to an opposition as a "reply." Parties filing petitions, oppositions and replies are listed in Appendix A. We use the abbreviations that appear in that Appendix throughout this Order.

[5] This system of tariffed charges governs recovery of most of the LEC costs apportioned to the interstate jurisdiction through the process of jurisdictional separations. MTS and WATS Market Structure, *Third Report and Order*, 93 FCC 2d 241 (1983) (hereinafter *Access Charge Order), modified on further reconsideration*, 97 FCC 2d 682 (1983) (hereinafter *First Reconsideration Order), modified on further reconsideration*, 97 FCC 2d 834 (1984) (hereinafter *Second Reconsideration Order), aff' d in principal part and remanded in part, National Ass' n of Regulatory Utility Comm' rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1224, 1225 (1985), *modified on further reconsideration*, 99 FCC 2d 708 (1984), 101 FCC 2d 1222 (1985), *aff' d on further reconsideration*, 102 FCC 2d 849 (1985).

[6] This Commission deferred subscriber line charges for residential and single-line business subscribers pending completion of several related proceedings. These proceedings included (1) an examination of (a) subscriber line charges as a means of cost recovery and the transition mechanism for implementing them, (b) assistance programs for low income households, and (c) assistance measures for subscribers in high cost study areas; (2) a further inquiry into the effects on universal service of subscriber line charges and federal decisions in general; and (3) a further inquiry to compile more detailed data on the extent and nature of bypass of the telephone network. *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules, *Further Notice of Proposed Rule Making*, 49 Fed. Reg. 18,318 at para. 3 (1984).

[7] *Id.* at para. 1.

[8] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules, *Recommended Decision and Order*, 49 Fed. Reg. 48,325 (1984). First, the Joint Board recommended that residential and single-line business subscriber line charges of1.00 per line per month be introduced in June 1985, with an increase to2.00 in June 1986. Second, the Joint Board proposed a limited federal lifeline assistance program involving a 50% reduction in subscriber line charges, when matched by an equal amount of state lifeline assistance, to customers qualifying under a state-established program that was means-tested and subject to verification. In conjunction with this proposal, it also recommended an expedited study to establish broader lifeline measures to assist low income households. Third, the Joint Board recommended retargeting the federal high cost assistance to provide additional assistance to telephone subscribers served by LECs with fewer than 50,000 access lines and LECs with particularly high loop costs.

[9] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules, *Decision and Order*, 50 Fed. Reg. 939 (1985).

[10] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Further Notice of Proposed Rule Making*, FCC 86-305 (released July 2, 1986), summarized at 51 Fed. Reg. 27,426 (hereinafter *Further Notice)*. Specifically, the *Further Notice* asked for comments on: (1) whether subscriber line charges should be increased, modified, or left unchanged at their present level; (2) whether the existing federal lifeline assistance program and high cost assistance measures reflected a properly targeted response to the needs of low income subscribers and subscribers in high cost areas, or whether these programs should be modified; and (3) what alternatives to the current mandatory pooling mechanisms may be available to recover the interstate allocation of NTS exchange costs. The *Further Notice* asked commenters to evaluate these proposals in terms of advancing the longstanding goals of this proceeding.

[11] The subscriber line charges for embedded Centrex, *i. e.*, Centrex lines in place or on order as of July 27, 1983, had been capped at 3.00 per line pursuant to a transition schedule established for such lines in order to afford state commissions additional time to reevaluate their intrastate Centrex rates. *See First Reconsideration Order*, 97 FCC 2d at 700-701; *Second Reconsideration Order*, 97 FCC 2d at 848-849; MTS and WATS Market Structure, 51 Fed. Reg. 7942, at para. 4. (Mar. 7, 1986).

[12] In December 1985, the Commission had adopted a Joint Board recommendation that broader lifeline assistance measures be implemented that provide for a waiver of the full subscriber line charge up to the amount matched by state assistance. MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 78-72 & 80-286, *Decision and Order*, 51 Fed. Reg. 1371 (Jan. 13, 1986).

[13] Under this recommendation, federal assistance would be available to match state reductions to local charges on any amount up to the full subscriber line charge of3.50, so that a customer could receive a total of 7.00 in benefits.

[14] The Joint Board recommendations specified that state Link Up America plans should be certified before federal benefits are made available, and proposed detailed, verifiable eligibility criteria for beneficiaries of the assistance.

[15] Initially, the cost of these lifeline assistance programs would be recovered through the CCL charge. Upon implementation of the proposed revisions to the present pooling mechanism in 1989, the Joint Board recommended that NECA administer a lifeline assistance revenue "pool" and that the costs be recovered through flat-rate, per-line charges assessed on IXCs based on the number of 1+ lines "presubscribed" to each such carrier. *See* 47 C.F.R. §§ 69.116 & 69.117 (1987).

[16] LECs that withdraw from the NECA pool are required to contribute long term support (LTS) to LECs that remain in the NECA pool, thus enabling pooling companies, which generally will be smaller high cost companies, to tariff a CCL charge equal to the charge that would result if all LECs remained in the pool. The Joint Board also recommended that four years of transitional support payments (TRS) be provided to qualifying LECs that withdraw from the pool. In order to qualify for TRS, LECs must be net recipients from the pool in 1988 and must withdraw from the NECA tariff and pool in accordance with a schedule that provides the largest companies one opportunity and smaller companies two opportunities to leave the pool and qualify to receive TRS. TRS will be paid by those nonpooling companies that were net contributors to the pool in 1988.

[17] The Joint Board's recommendations and the Commission's *Order* intended that once a company (or group of affiliated companies) elects to leave the NECA common line pool and file its own CCL tariff, it may not choose to participate in the NECA common line pool at a later date. The new rules implementing the pooling modifications accordingly do not include any mechanism for a company that has left the NECA common line pool to reenter that pool.

[18] *See Order* at paras. 27-42. For a more comprehensive review of the history of this proceeding and of the Joint Board recommendations, *see Recommended Decision.*

[19] *See Order* at para. 41; MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 2 FCC Rcd 3298 (1987).

[20] California Petition at 2-6; D.C. PSC Petition at 3-4.

[21] California Petition at 6-7.

[22] D.C. PSC Petition at 4-8.

[23] California Petition at 7-8.

[24] NASUCA Petition at 1-5. NASUCA submits a report analyzing bypass and subscriber line charge issues as an attachment to its petition in support of its argument that bypass is largely driven by non-price factors. *See Bypass and the Subscriber Line Charge*, Bethesda Research Institute, Ltd. (June 1987). In its Opposition, Bell Atlantic argues that, as a procedural matter, this appendix cannot be relied upon to support the NASUCA position because the study does not present new evidence or changed circumstances, and the facts were not previously unknown or unavailable through the exercise of ordinary diligence at the time the record was developed in the underlying proceeding. Bell Atlantic Opposition at 4 n.11. NASUCA does not explain why it did not submit its study for timely consideration by the Joint Board. We do not dispute Bell Atlantic's observations, but we find that consideration of the facts detailed in the report in this reconsideration proceeding is in the public interest pursuant to 47 C.F.R. § 1.429(b)(3) (1987).

[25] NASUCA Petition at 5-6.

[26] Tennessee Petition at 2-3 (footnote omitted), Klein Exhibit. Tennessee expressly notes that it is not asking this Commission to revisit our conclusion that IXCs should pay less of the costs of maintaining the local network, acknowledging that, although it disagrees with our conclusion, the arguments on the issue have been fully aired.

[27] *Id.* at 3; Indiana Consumer Counselor Petition for Rule Making at 2. The Indiana Consumer Counselor further suggests that these tax savings should be applied to reduce the subscriber line charge below the2.00 level.

[28] *See* NYNEX Opposition at 3, 8-9; Ameritech Opposition at 3; BellSouth Opposition at 3, 5; Southwestern Bell Opposition at 2-4; USTA Opposition at 5, 10; US West Opposition at 4. Many of these parties particularly criticize California's continuing efforts to advocate the use of subscriber line usage as the allocation factor for NTS costs, noting that California's arguments have been fully considered in the past. USTA and NYNEX further observe that the Joint Board and this Commission properly found that the California proposal would be less equitable than the plan adopted in the *Order*, and would produce significant problems in many areas of the country. USTA Opposition at 8-9; NYNEX Opposition at 7-8.

[29] USTA Opposition at 5-6; Ameritech Opposition at 6-7; AT&T Opposition at 1-7; Bell Atlantic Opposition at 3-4; BellSouth Opposition at 2-3; NYNEX Opposition at 3-4; Southwestern Bell Opposition at 3; and US West Opposition at 5-7. Several of these parties further note that recent studies released by this Commission indicate that subscribership is at a higher level than it was when reporting of such data began in 1983. *See , e. g.*, Southwestern Bell Opposition at 3.

[30] NYNEX Opposition at 4; Bell Atlantic Opposition at 4; BellSouth Opposition at 3-4.

[31] Ameritech Opposition at 7-9 (footnote omitted); *see also* NYNEX Opposition at 10-11; BellSouth Opposition at 4; Southwestern Bell Opposition at 3-4; UTS Opposition at 2-3.

[32] Bell Atlantic Opposition at 3; Southwestern Bell Opposition at 7-8. Southwestern Bell observes that the D.C. PSC focuses on the recovery of NTS costs, but ignores the benefits that will be enjoyed by the District of Columbia as a result of other aspects of the access charge plan. It further suggests that any concerns peculiar to the District of Coulmbia should be resolved locally through negotiations between the D.C. PSC, the affected LEC, and the Commission, and should not be used as an excuse to implement wholesale modifications to the overall plan. In its reply, the D.C. PSC notes that it would welcome the opportunity to enter into negotiations to determine whether special treatment is appropriate for the District of Columbia. D.C. PSC Reply at 2-4.

[33] Bell Atlantic Opposition at 2; AT&T Opposition at 15-16.

[34] AT&T Opposition at 14. n., 15-16; US West Opposition at 7; USTA Opposition at 7-8.

[35] NYNEX Opposition at 6-7; Ameritech Opposition at 3-6; Bell Atlantic Opposition at 4-6; Southwestern Bell Opposition at 5; UTS Opposition at 2. Some of these parties note that the Joint Board recognized that service bypass is more extensive than facilities bypass, and is thus of more immediate concern.

[36] NYNEX Opposition at 4-7; Ameritech Opposition at 4-5; Southwestern Bell Opposition at 5-6; BellSouth Opposition at 5 n. 4; USTA Opposition at 4 n. 9. Moreover, Ameritech notes that by contrast to the other factors identified in the NASUCA study, price is a variable that this Commission can affect.

[37] BellSouth Opposition at 6-7; USTA Opposition at 4-5; Bell Atlantic Opposition at 2 n.3; NYNEX Opposition at 14-15; US West Opposition at 3-4, 10-11.

[38] US West Opposition at 3-4, 10-11; BellSouth Opposition at 6-7.

[39] USTA Opposition at 4-5; Ameritech Opposition at 9 n. 10; US West Opposition at 3-4, 10-11.

[40] USTA Opposition at 4-5; *see also* Bell Atlantic Opposition at 2 n. 3; US West Opposition at 10-11.

[41] The Indiana Consumer Counselor suggests that the deferred tax accounting method used by most LECs will negate most other changes in the Tax Reform Act that will increase the taxable income of certain utilities, and dismisses as speculation the arguments advanced by US West that future tax increases would erase existing tax savings. Indiana Consumer Counselor Reply at 2-3.

[42] *Id.* at 2-3. In its reply, the Indiana Consumer Counselor also objects to this Commission's decision to treat its Petition for Rule Making as a petition for reconsideration in this docket. The Indiana Consumer Counselor claims that it was not notified that its Petition for Rule Making was being treated as a petition for reconsideration, that it has been unable to respond to the arguments raised in opposition, and that the decision to classify its petition as a reconsideration request violates our Rules. The Indiana Consumer Counselor requests that its petition be redesignated as a separate petition for Rule Making. Although pursuant to 47 C.F.R. § 1.401(e) this Commission could have previously denied or dismissed the Indiana Consumer Counselor petition for Rule Making since it raised the same issues being addressed in this reconsideration proceeding, we instead elected to treat this petition as a reconsideration request so that the Indiana Consumer Counselor's arguments would be considered on the record in the appropriate proceeding. The Indiana Consumer Counselor did receive public notice that its petition was being so treated (*see* Public Notice 4027 (released July 16, 1987)), and was, as the Indiana Consumer Counselor itself acknowledges, properly served with the oppositions to its petition. As a consequence, the Indiana Consumer Counselor was able to respond fully to the arguments raised in opposition to its petition, and, in fact, did so in its reply.

[43] D.C. PSC Petition at 8-13; D.C. PSC Reply at 3-4.

[44] In support of this claim, the D.C. PSC cites language in the *First Reconsideration Order*. *See* D.C. PSC Petition at 8-9.

[45] *Id.* at 12-13.

[46] Bell Atlantic Opposition at 5 n. 14.

[47] NATA Opposition at 2-11; AT&T Opposition at 10-11.

[48] NATA Opposition at 2-9; AT&T Opposition at 11 n. **.

[49] AT&T Opposition at 11-12 & 12 n. *. AT&T explains that it has also developed its own projections for NTS costs, but that, even under its own estimates (which incorporate growth in lines and revenue requirements), the maximum Centrex charge will decrease to3.95 in 1989 in the District of Columbia.

[50] *See supra* paras. 7 & 11.

[51] *Order* at para. 29; *Recommended Decision* at paras. 32-37.

[52] *Recommended Decision* at para. 35.

[53] *See supra* para. 16. This monitoring program includes an open docket to assure that interested parties can file comments or information at any time. *See supra* note 19. To the extent that California or others question the relevance or reliability of data gathered by the U.S. Census Bureau or other data relied upon by the Joint Board and this Commission, those comments should be made part of that docket. *Cf.* California Petition at 2-6.

[54] *See* Monitoring Report, CC Docket No. 87-339, September 1987 (hereinafter "September 1987 Monitoring Report); Monitoring Report, CC Docket No. 87-339, December 1987; Monitoring Report, CC Docket No. 87-339, March 1988; Monitoring Report, CC Docket No. 87-339, June 1988 (hereinafter "June 1988 Monitoring Report).

[55] *See* June 1988 Monitoring Report at 13-14; 43-47. These studies also suggest that most customers who are involuntarily disconnected or who disconnect voluntarily for economic reasons are above-average users of telephone services who find they cannot afford their level of usage. *Id.* at 14.

[56] *See* Basic Exchange Telecommunications Radio Service, *Report and Order*, 3 FCC Rcd 214 (1988).

[57] *See* 3 FCC Rcd (1988).

[58] *See Recommended Decision* at para. 38.

[59] *See Order* at para. 29; *Recommended Decision* at para. 39.

[60] *See Recommended Decision* at paras. 38-40; *Order* at paras. 28-29.

[61] *See supra* para. 12. As several commenters observe, California and the D.C. PSC ignore the benefits that low-cost jurisdictions enjoy as a result of the access charge plan. For example, the common line pooling modifications made possible by the plan will afford LECs in low-cost jurisdictions needed flexibility to charge CCL rates closer to their relevant costs as well as reduce the contributions that these LECs make to the nationwide recovery of NTS costs. These parties also correctly observe that, contrary to California's claim, LECs can not overrecover their costs under our Rules. *See supra* para. 17.

[62] *See Recommended Decision* at paras. 48-49 & n. 88. California proposes a program for a transition from use of the subscriber plant allocation factor to use of subscriber line usage. That proposal was described in the pleadings submitted by California earlier in this proceeding. *See* California Petition at 7-8. California's proposal has already been fully considered in this proceeding and was rejected in favor of the subscriber line charge program. *See Recommended Decision* at paras. 24 & 54; *see also* NYNEX Opposition at 7-8; USTA Opposition at 8-9.

[63] *See Recommended Decision* at para. 49 & n. 88.

[64] *See Order* at paras. 37-40; *Recommended Decision* at paras. 41-42; September 1987 Monitoring Report at 85-104. In reaching this conclusion, we do not, as NASUCA suggests, ignore the existence of incentives for bypass other than price.

[65] The Joint Board has considered the possibility of using evidentiary hearings in CC Docket No. 80-286, and concluded that the Administrative Procedure Act and relevant case law do not require more than notice and comment procedures. *See* MTS and WATS Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 47 Fed. Reg. 54479 at para 315 (1982).

[66] NASUCA's proposal was unanimously opposed by the commenting parties that addressed the issue. *See supra* para. 16.

[67] *See Order* at paras. 27-42.

[68] *See supra* para. 14. In light of this conclusion, we deny the Petition for Rule Making filed by the Indiana Consumer Counselor on June 18, 1987, pursuant to 47 C.F.R. § 1.401(e) (1987). *See supra* note 42.

[69] Indeed, the Joint Board recognized that state commissions are free to deal with any reductions in intrastate revenue requirements that might result from changes in the tax treatment of carriers under their jurisdiction in whatever manner best serves the public, and may, for example, decide to reduce local rates or create customer credits. *See Recommended Decision* at para. 46 n. 84. We note that the Indiana Consumer Counselor and Tennessee do not specify how any tax savings, which would take the form of reduced revenue requirements in many LEC services, would be translated into reduced subscriber line charges.

[70] As the Common Carrier Bureau recently recognized in its order reviewing the 1988 annual access tariffs, the effect of the Tax Reform Act will be different from company to company. Annual 1988 Access Tariff Filings, DA 87-1876, at para. 14 (released Dec. 24, 1987).

[71] *Cf.* Tennessee Petition at 2-3.

[72] *See* Refinement of Procedures and Methodologies for Prescribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, 3 FCC Rcd 1697, 1698 (1988).

[73] The D.C. PSC claims it set its Centrex rates in reliance upon a statement in our *First Reconsideration Order* that equality would be maintained between residential and embedded Centrex subscriber line charges until 1989. *See First Reconsideration Order*, 97 FCC 2d 682, 700-701 (1983). This approach was, however, modified shortly thereafter. In response to petitions for further reconsideration, this Commission expressly abandoned the plan to keep residential and embedded Centrex charges at the same level through 1989. *See Second Reconsideration Order*, 97 FCC 2d 834, 836, 848-849, 851-52 (1984). The D.C. PSC's decision to refrain from raising rates for Centrex Rate Stability Plan customers was not, however, adopted until 1985, well after the initial statement that equal charges would apply to residential and embedded Centrex lines was superceded on further reconsideration. *See* D.C. PSC Petition at 11; *see also* NATA Opposition at 2-9; AT&T Opposition at 10-11.

[74] This transition is part of a nationwide move to a 25 percent interstate gross allocation factor for subscriber line investment that was recommended by the Joint Board and adopted by this Commission. *See* Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Decision and Order*, 96 FCC 2d 781 (1984), *aff'd Rural Telephone Coalition v. FCC*, No. 84-1110 (D.C. Cir. Feb. 5, 1988).

[75] D.C. PSC Petition at 5.

[76] *See* 47 C.F.R. §§ 69.104(c), 69.203, 69.301(b), 69.501 & 69.502 (1987).

[77] In its opposition, AT&T notes that its estimates differ somewhat from the D.C. PSC figures, apparently because the AT&T analysis incorporates growth in lines and revenue requirements. AT&T projects that the base factor portion of NTS costs in the District of Columbia will be3.99 in 1988 and 3.95 in 1989, which would still result in Centrex charges well below the 6.00 level. *See* AT&T Opposition at 12 n. *.

[78] 47 C.F.R. § 69.105 (1987).

[79] *See* WATS Related and Other Amendments of Part 69 of the Commission's Rules, CC Docket No. 86-1, *Report and Order* (released Mar. 21, 1986) (hereinafter *WATS Order*).

[80] *See Recommended Decision* at para. 50. In accordance with Part 69 of our Rules, interstate common line costs that are not recovered through subscriber line charges are presently recovered through the CCL charge and the private line surcharge. Therefore, the higher the amount of common line costs recovered through subscriber line charges, the lower the CCL charge will be. *See* 47 C.F.R. §§ 69.601-69.610 (1987).

[81] *Order* at paras. 13, 27, Appendix A at para. 12.

[82] *See* Exchange Carrier Association Tariff F.C.C. No. 1, 17th Revised page 118.2. In ruling on these 1988 access tariff reductions, the Common Carrier Bureau denied requests to continue a *de minimis* charge on originating minutes while also permitting reductions to the terminating end CCL charge. In so doing, the Bureau observed that it would be inappropriate for it to waive the Commission Rule that presently imposes a "freeze" on the terminating charge. Annual 1988 Access Tariff Filings, DA 87-1876, at para. 241-42 (released Dec. 24, 1987).

[83] MCI Petition at 1-5; MCI Reply at 1-4. MCI asserts that the record on bypass was stale because commenters had not taken account of access charge rule changes that became effective in June 1986. It emphasizes that, even apart from timeliness concerns, the record on bypass does not justify the decision to allocate the decrease in the CCL charge exclusively to the originating charge, in part because the prescribed allocation would only deter "service" bypass, *i. e.*, migration of users from switched to special access services due to uneconomic charges, but would not affect bypass of all LEC facilities.

[84] MCI Petition at 5-6.

[85] *Id.* at 7-9. MCI cites an Ameritech petition seeking permission to impose the higher terminating CCL charge on both ends of non-traditional 800 services (such as AT&T's Readyline and MCI's 800 Credit Card services) that use common lines for terminating traffic as an example of the inequities that could flow from a decision to keep the terminating end charge at 4.33 cents. The Common Carrier Bureau recently determined, however, that the Ameritech petition should be rejected, and that non-traditional 800 services should be assessed charges in the same manner as any other service offering with two open ends. *See* AT&T Communications Revisions to Tariff F.C.C. No. 2 (800 Readyline Service), Transmittal Nos. 735 and 781, *Memorandum Opinion and Order* 2 FCC Rcd 5939 (1987) (hereinafter " *Readyline Order).*

[86] Ad Hoc Opposition at 2-10; Ad Hoc Reply at 2-3, 6-10; ADAPSO Opposition at 1-5; Ameritech Opposition at 9-10. Ad Hoc asserts that evolving interexchange switching technology has "equalized" the bypass susceptibility of originating and terminating access. Ameritech comments that most users have already taken advantage of the economies of WATS access lines on the originating end, and will in the future seek to avoid the CCL charge on the terminating end. To address this concern, it recommends applying future subscriber line charge increases to reduce the terminating charge.

[87] Ad Hoc Opposition at 10-14; Ad Hoc Reply at 2-3, 6-7; ADAPSO Opposition at 2-5. Ad Hoc also notes that continuation of the substantial differential between originating and terminating CCL charges would result in a significant economic impact on enhanced service providers (who have substantial one-open- end usage, which is subject to terminating charges) if we adopt our proposal to apply access charges to such entities. *See* Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, *Notice of Proposed Rule Making*, 2 FCC Rcd 4305 (1987). This Commission, however, recently declined to adopt the proposal to require enhanced service providers to pay access charges. *See* Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, *Order*, FCC 88-151 (released Apr. 27, 1988).

[88] Bell Atlantic Opposition at 5-6; NYNEX Opposition at 11-12; Southwestern Bell Opposition at 8-11; USTA Opposition at 11-12; and US West Opposition at 8-10. Bell Atlantic also observes that MCI has provided no evidence to show that there is a material difference in the amount of originating versus terminating traffic carried by individual carriers, and comments that no substantial administrative problems have surfaced since the differential was implemented on June 1, 1986.

[89] *See , e. g.*, Southwestern Bell Opposition at 9-10; NYNEX Opposition at 11-12.

[90] Thus, while we do not agree with Ad Hoc's suggestion that the bypass susceptibility of originating and terminating access is already equalized by improvements in interexchange switching technology (*cf. supra* note 86), we expect that these technological developments will reduce the differential between the two types of bypass in the long term.

[91] *See WATS Order* at para. 55. Furthermore, we are aware of other reasons why our interim approach may not be appropriate as a long-term resolution. For example, it appears that the bifurcated approach has created certain implementation problems for LECs and IXCs, as exemplified by the new 800 services that use common line connection on each end. *See Readyline Order* at paras. 8-30. Under our current Rules, a LEC on the originating end of an interstate call needs to know whether the call terminates over a common line or a private line in order to apply the proper originating charge; it does not always have this information.

[92] *See* 47 C.F.R. § 69.207.

[93] Revisions to Section 69.207 of our Rules to reflect this change are set forth in Appendix B.

[94] *See supra* note 91.

[95] *See supra* para. 42.

[96] To the extent parties contend that we should continue bifurcated rates beyond March 31, 1989, they should address the structure of the bifurcation scheme, *i. e.*, whether we should continue with a frozen terminating charge or move to a frozen originating charge for both pooled and non-pooled carriers and at what level. We intend by this request for comments to establish baseline rules for CCL recovery. We do not intend to examine here any broader questions regarding CCL rate flexibility.

[97] *See Recommended Decision* at paras. 92-96, 121-122. Under that result, all LECs would have been precluded from participating in a nationwide pool and would have had to charge rates based on their costs, or if affiliated companies filed together, based on their averaged costs.

[98] *See* Joint Comments of the National Rural Telecom Association, National Telephone Cooperative Association, Organization for the Protection and Advancement of Small Telephone Companies and United States Telephone Association, CC Docket Nos. 78-72 & 80-286 (Aug. 29, 1986) at 8 (hereinafter "Joint Comments).

[99] *See Recommended Decision* at para. 130.

[100] *Order* at paras. 24-25, 32-33.

[101] Contel Petition at i, 7-8; Contel Reply at 2-4. We note generally that, although Contel's arguments and our discussion below focus more on the requirement that a holding company must withdraw all of its affiliates if it decides to leave the pool, the same analysis applies to both aspects of the affiliate withdrawal requirement -- that a holding company leaving the pool must withdraw all of its companies, and that a departing company must withdraw all of its study areas.

[102] Contel Petition at i-ii, 4-12; Contel Reply at 3-6. Contel asserts that the contention that holding companies would withdraw only their low cost areas if the rule were changed, resulting in mere administrative changes in the current pooling arrangement, is unsubstantiated and hypothetical. Contel further argues that the concern regarding cost misallocations was raised without any evidence that improper cost-shifting between study areas has ever occurred.

[103] Contel Petition at 13-16. Contel contrasts the affiliate withdrawal rule with this Commission's recent decision on cost allocation requirements in CC Docket No. 86-111, the high cost funding mechanism adopted in our May 19 *Order*, other aspects of our access charge rules, and various requirements of state and other federal agencies. *Id.*

[104] Ameritech Opposition at 13 n. 15.

[105] Bell Atlantic Opposition at i, 6-7; Southwestern Bell Opposition at 12- 13. Bell Atlantic also notes that this requirement reduces the financial demands (in terms of long term support) that would otherwise be placed on LECs exiting the pool, and eliminates any concern about improper cost allocations among affiliates.

[106] NYNEX Opposition at 12-13. In response to NYNEX, Contel contends that the flexibility NYNEX describes may be available as a practical matter to holding companies with predominately low-cost LECs, but is not an attractive option to a company such as Contel, which has both high and low cost LECs. Contel explains that if it leaves the pool and does not average the rates of its study areas, a number of these areas will have exorbitantly high rates. Contel Reply at 5-6.

[107] Although Contel suggests that the pooling modifications adopted by this Commission are inconsistent with our longstanding goal of encouraging cost- based rates, we consider that one of the more important benefits of our approach is that it will enable cost companies leaving the pool to offer rates that are closer to their costs than they could offer if they were to remain in the pool. *See Order* at para. 33. The pooling changes will, for example, afford these companies the opportunity to charge CCL rates on study area basis if they so choose, and these rates would be closer to the carriers' costs than the rates they would have charged in the pool. Moreover, if holding companies leaving the pool opt to file interstate common line tariffs reflecting average rates for their affiliated companies, this flexibility furthers the goals of this proceeding because it involves less averaging than the mandatory nationwide pool. Even with their long term support obligations, such rates should be closer to the costs of the affiliated companies, on an aggregate basis, than the rates these companies would have charged if they remained in the NECA common line pool. Moreover, these costs are under the holding company's control, and thus it may realize some of the benefits of its own efficiencies and cost savings, which, in a nationwide mandatory pooled environment, must be shared with all other LECs.

[108] The average pooled rate is further moderated by long term support payments from non-pooling carriers. *See supra* note 16. As the Joint Board explained, some form of pooling and long term support arrangement among all LECs was needed to ensure that small, unaffiliated LECs with high NTS costs would not be forced to impose inordinately high NTS cost recovery burdens on their subscribers, would not be faced with the administrative difficulties of filing their own interstate tariffs, and would continue to enjoy the benefits of risk sharing and a steady return on investment. *See Recommended Decision* at para. 121. Maintaining a modified pool would also reduce widespread disparities among CCL rates which could lead to pressure on geographic toll rate averaging and bypass concerns.

[109] Of course, under either approach LECs affiliated with a holding company that leaves the pool will still be able to recover their relevant interstate costs through the CCL charges, and high-cost LECs will still be able to take advantage of the high-cost assistance measures adopted in our *Order*.

[110] *See Recommended Decision* at para. 127.

[111] Net pool recipients can receive transitional support payments under our Rules. *See* 47 C.F.R. § 69.612 (b) (1987).

[112] We observe that there are no regulatory barriers to prevent carriers from taking advantage of the economies of scale made available by their affiliation with a larger holding company in filing a unified interstate common line tariff or sharing the expertise and other resources used in tariff preparation. Because the rates and costs at issue here are interstate, there should be no conflict with any state restrictions; the record supports this conclusion. We also know of no corporate barriers to such an undertaking, and note that neither the industry nor Contel has brought the existence of any such barriers to our attention during the lengthy process of formulating the new pooling approach.

[113] While we recognize that the cost characteristics of a company or study area are not the only criteria that a holding company would consider in deciding whether or not an affiliated company or study area should leave the pool, given the incentives it is doubtful that many holding companies would decide to take very high-cost companies or study areas out of the pool or leave very low-cost ones in the pool if given the flexibility Contel requests.

[114] *See Recommended Decision* at para. 130; *Order* at paras. 25, 32. In its petition, Contel suggests that the "all-or-nothing" standard for withdrawal from the common line pool is inconsistent with the administration of the traffic-sensitive (TS) pool, which does not have such a requirement. *See* Contel Petition at 6-7. We note, however, that the common line pool has always been structured very differently from the TS pool. First, the TS pool does not involve the same extent of support flows among companies as exists in the common line cost recovery process. This is due to the fact that TS costs do not vary among companies nearly as much as NTS costs, and thus the per minute TS charges reflect a closer cost/revenue match than the NTS charges. We also emphasize that LECs remaining in the TS pool do not receive support from LECs that have left the pool. Thus, the question of whether a particular holding company removes all of its study areas from the TS pool does not affect LECs outside the TS pool. In the case of the NTS pool, LECs that opt to leave the pool are required to provide long term support to LECs remaining in the pool to moderate the level of the CCL charge to be levied by the pool participants. This structure makes the affiliate withdrawal requirement a critical element in the achievement of the full benefits of the pooling modifications.

[115] We note that our concern with improper cost allocations among study areas is based on our desire not to provide an unnecessary incentive for such cost-shifting in the common line context, and not on recorded evidence of past abuses. *Cf. supra* note 102. Regulatory controls are, of course, often designed to deter unlawful behavior and are not always based upon actual evidence of abuse. Moreover, in this case, since NTS costs vary among companies much more than TS costs (*see supra* note 114) it seems likely that, if the additional flexibility proposed by Contel were made available in the common line pooling structure, companies would have an incentive to shift costs among study areas -- a greater incentive than currently exists in the TS context which Contel references.

[116] Contel claims that LECs affiliated with a holding company are independently operated and generally treated as such for purposes of regulation by state and federal agencies. *See supra* note 103. We acknowledge that there are many cases in which this Commission and other regulatory agencies require individual LECs, regardless of affiliation, to meet specific accounting, reporting or registration requirements, as, for example, in our CC Docket 86-111 cost allocation rules. We also provide some targeted benefits to individual LECs (instead of to the holding company with which LECs are affiliated) where this is appropriate, as in our funding mechanism for assisting high-cost companies. Regulatory requirements such as these are applied on an individual-LEC basis if this approach will best achieve the purposes of the broader regulatory program, *e. g.*, to monitor closely cost allocations between regulated and unregulated activities for an individual LEC (as in the cost allocation rules), or to ensure that individual LECs with unusually high costs receive our narrowly-targeted high-cost funding assistance in the most expedient manner.

[117] *See , e. g., Recommended Decision* at para. 127.

[118] *See supra* para. 52.

[119] *See supra* paras. 50 & 53.

[120] *Order* at para. 32.

[121] Contel Petition at ii.

[122] *See supra* para. 53; *Order* at para. 32.

[123] For example, as discussed in more detail in paragraph 52, a high-cost LEC affiliated with a large holding company is in a better position to take advantage of the option to leave the common line pool than a similar unaffiliated LEC because the affiliated status may enable the LEC to participate in a single common line tariff covering all its affiliated companies. As a result, such a LEC could realize the opportunities for additional rate flexibility and cost-based pricing available outside the pool, while avoiding the economic risks and administrative burdens of filing individual tariffs. As was noted above, there do not appear to be any regulatory or corporate barriers to prevent carriers from filing a single interstate common line tariff for their affiliates outside the pool. Indeed, certain holding companies have filed aggregated tariffs for some of their TS elements for some time.

[124] The Commission Rule that was at issue in *ALLTEL* and the practical effect of requiring large exchange carrier holding companies to choose one or more of the following alternatives: (1) convert all of their average schedule companies to cost; (2) divest their average schedule companies; or (3) divest their cost companies. None of these considerations are relevant here. Our affiliate withdrawal requirement does not require Contel to divest any exchange carrier operations, nor is it otherwise required to reconfigure its corporate structures, operations, or tariffs.

[125] *See supra* note 16 and 47 C.F.R. §§ 69.3(e), 69.612 (1987). Of course, any carrier may leave the pool after the January date, but at such time it will no longer qualify for transitional support payments.

[126] *See* Joint Petitioner Petition at 4, *citing Recommended Decision* at para. 133 n. 197.

[127] The definitions contained in Section 69.2 of our Rules provide in relevant part that a "telephone company or group of affiliated telephone companies with fewer than 300,000 access lines and less than 150 million in annual operating revenues . . . ." would be considered a Level II company. 47 C.F.R. § 69.2 (jj) & (kk) (1987). Thus, while the language of the *Recommended Decision* would have treated a company with less than 300,000 access lines or less than150 million in annual operating revenues as a Level II company, the text of the Rules in effect requires a company to have both less than 300,000 access lines and less than150 million in revenues before it would be classified as a Level II company.

[128] Joint Petitioners Petition at 4-6.

[129] USTA Opposition at 10-11. In addition, Bell Atlantic notes that it has no objection to the Joint Petitioners' requests. Bell Atlantic Opposition at 1 n. 2.

[130] NYNEX Opposition at 13-14. Ameritech also generally states that it opposes requests to modify the prescribed procedures for withdrawal from the pool, but does not explicitly reference the Joint Petitioners' proposals. *See* Ameritech Opposition at Summary, 12-13.

[131] Joint Petitioners Reply at 3-4.

[132] Revisions to Section 69.2 of our Rules to reflect this change are set forth in Appendix B.

[133] *See* Recommended *Decision* at para. 133 n. 197. This language from the *Recommended Decision* is cited with approval by this Commission in note 31 of the *Order*.

[134] We note that Joint Petitioners do not challenge the precise dividing line we have chosen or propose an alternative dividing line, but rather suggest that this Commission not adopt an objective dividing line at all, but instead limit Level I companies to a list of designated companies. *See* Joint Petitioners Petition at 5-6.

[135] As we explained above, the only consequence of a company being categorized as Level II rather than Level I is that the company would have two opportunities to decide to leave the pool and still receive TRS, instead of one such opportunity. A company does not forfeit its right to choose to leave the pool and receive TRS simply because it falls into the Level I category.

[136] NECA Petition at 1-3, Attachment A. Thus, under NECA's proposal, if the actual subscriber line charge waiver assistance benefits paid exceeded the projected amount for the prior period, the differential would be added to the projected revenue requirement for the ensuing period; if the benefits paid were less than projected, the differential would be subtracted from the next period.

[137] *See* Ameritech Opposition at 11; Southwestern Bell Opposition at 2 n. 1; USTA Opposition at 11.

[138] Revisions to Section 69.104(l) of our Rules to reflect this change are set forth in Appendix B.

[139] *See* 47 C.F.R. §§ 69.116(c) & 69.117(c). Local exchange companies participating in the lifeline programs will estimate and report to NECA the number of qualifying subscribers under all assistance programs and the dollar amount of benefits per subscriber. All LECs will report to NECA the number of 1+ lines in their study areas and the interexchange carriers to which such lines are presubscribed.

[140] *See* NECA Petition at 1-3, Attachment B.

[141] *Id.* at 3-4, Attachment B.

[142] USTA Opposition at 11.

[143] Revisions to Sections 69.116 and 69.117 of our Rules to reflect these changes are set forth in Appendix B. These modifications necessitate a change in the effective date of these sections of the Rules from April 1, 1989, to August 1, 1988. Subsections (a) and (b) of Sections 69.116 and 69.117 have been amended to clarify that the charges described in these subsections will not be assessed before April 1, 1989, even though the reporting of presubscribed lines will commence in August 1988.

[144] *See* generally 47 C.F.R. § 1.1206(a) (1987).

[145] *See* 47 C.F.R. §§ 1.1202(f) & 1.1203.

[146] *See* 47 C.F.R. § 1.1202(b).

[147] *See* 47 C.F.R. § 1.1206.

[148] We certify that the Regulatory Flexibility Act, 5 U.S.C. § 603, is not applicable to the rule changes we are adopting in this proceeding. In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administrationat the time of publication of this *Memorandum Opinion and Order on Reconsideration* in the Federal Register. Because of the nature of local exchange and access services, this Commission has concluded that small telephone companies are dominant in their field of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-89 (1983). Thus, this Commission is not required by the terms of that Act to apply the formal procedures set forth herein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate procedures to analyze the effect of proposed regulations on small telephone companies. As part of our analysis of the issues discussed in this order, this Commission has considered the impact on small telephone companies, *i. e.*, those serving 50,000 or fewer access lines. Our changes will not have an adverse effect on those companies and should benefit such carriers through increased flexibility in common line recovery and increased federal assistance through the lifeline and high cost assistance measures.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-72
CC Docket No. 80-286

In the Matter of

MTS and WATS Market Structure

Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board

ERRATUM

Released: July 18, 1988

On July 8, 1988, the Commission adopted a Memorandum Opinion and Order On Reconsideration and Order Inviting Comments in this proceeding, FCC 88-228, released July 12, 1988. Paragraph 72 of this order inadvertently omitted the effective date of those rule modifications contained in Appendix B that did not have an effective date attached to the rule. The effective date for the rules contained in Appendix B will be August 25, 1988, except for the rule modifications to Sections 69.116 and 69.117, for which the effective date will remain August 1, 1988, as is already indicated in the text of Appendix B. Accordingly, Paragraph 72 should be corrected to read:

> 72. IT IS FURTHER ORDERED, that the rule modifications contained in Appendix B are ADOPTED, effective **August 25, 1988.**

We also clarify that, pursuant to Section 1.427(b) of the Commission's Rules, 47 C.F.R. § 1.427(b) (1987), there is good cause for the effective dates for the amendments to Sections 69.116 and 69.117 to be less than 30 days from the time these rule modifications are published in the Federal Register because the data called for in these rules must be made available as soon as possible to afford the National Exchange Carrier Association sufficient time to develop a workable billing system for charges based on the data called for in these sections.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 83-523

In the Matter of

Amendment of Part 74 of the Commission's Rules and Regulations In Regard to the Instructional Television Fixed Service

ORDER AND SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: July 13, 1988; Released: July 22, 1988

By the Commission:

1. On January 5, 1988, the U. S. Court of Appeals, D.C. Circuit, remanded to the Commission for further consideration two aspects of the rules governing the Instructional Television Fixed Service (ITFS).[1] *Telecommunications Research and Action Center v. Federal Communications Commission (TRAC v. FCC)*, 836 F.2d 1349 (D.C. Cir. 1988). Those rules were established in *Second Report and Order* in MM Docket No. 83-523 (*ITFS Order*), 101 FCC2d 49 (1985); *Memorandum Opinion and Order* in MM Docket No. 83-523 (*ITFS Reconsideration Order*), 59 RR2d 1355 (1986); *aff'd*, 1 FCC Rcd 24 (1986). First, regarding the Commission's decision not to predetermine a regulatory classification for nonsubscription service offered on ITFS excess capacity, the Court remanded "for the FCC to make the basic classification determination or to explain why it should not have to at this time." *TRAC v. FCC*, *supra* at 1356. Second, the Court rejected the Commission's decision to break ties in its comparative selection procedure (for choosing among mutually exclusive ITFS applicants) by using a lottery without the minority and diversity preferences of the Lottery statute.[2] The Commission is now proposing the adoption of additional rules in response to the Court's decision.

SERVICE CLASSIFICATION

2. When the Commission extensively revised the rules for ITFS in MM Docket No. 83-523, it concluded that the initial classification of ITFS as a nonbroadcast service would not be changed. *ITFS Reconsideration Order*, *supra* at 1376. It stated that the primary use of ITFS, delivery of educational materials to a limited audience (students pursuing academic credit), did not constitute a broadcast use, and that excess capacity use is typically provided on a subscription basis. It observed that a broadcast classification has never been applied to the primary, educational use,[3] and that classification of the subscription service use of excess capacity was the subject of a Rule Making at that time.[4] *Id.* The Court agreed that ITFS educational use is not broadcasting, and that subscription use of excess capacity was already properly the subject of another proceeding. It was concerned, however, that the Commission had not adequately addressed the possibility that excess capacity could be utilized on a nonsubscription basis to provide broadcast service. Although the Commission believed that any nonsubscription use of excess capacity is highly unlikely, and that a broadcast use would be brought to the Commission's attention by interested members of the public if it did occur, the Court was concerned that a broadcast-type service might develop and operate unregulated. *TRAC v. FCC*, *supra* at 1356. It concluded that if the Commission continues to defer the classification of such a potential service, it "should explain what useful information it expects to learn in any interim period and, at a minimum, consider requiring licensees to inform the agency of any plans to provide noneducational ITFS on a nonsubscription basis." *Id.*

3. In authorizing non-ITFS use of ITFS excess capacity, the Commission anticipated that ITFS excess capacity would be used for variations of fixed (nonbroadcast) services, for which that part of the spectrum is generally allocated. 47 C.F.R. §2.106. It envisioned subscription television service as the principal usage. Subsequently, in the *Subscription Video* proceeding, it noted that fixed services are not necessarily limited to subscription services. In fact, nonsubscription point-to-multipoint service on ITFS excess capacity could be offered for a variety of conceivable private and public safety purposes; *e.g.*, remote (suburban) newspaper printing or the exchange of administrative information among police precincts.[5] To date, the Commission has declined to affix any particular regulatory regimen to main channel nonsubscription services that might be offered on the excess capacity of ITFS facilities -- broadcast, nonbroadcast, or otherwise[6] -- presuming that such service is unlikely to occur and that the form it will take is difficult to predict.

4. It remains apparent that any such service, which has yet to define itself, can be classified more appropriately, more capably, and more efficiently with concrete information regarding its precise nature and method of operation. Accordingly, no attempt will be made to classify here by Rule Making services which do not exist at this time, which may never exist, and whose actual permutations cannot now be predicted.[7] However, in order to preclude the possibility of statutory and rule violations by ITFS operators using or leasing for use their excess capacity for non-ITFS services which may be offered on a nonsubscription basis, the Commission will require notification by the operator and specific approval by the Commission prior to the offering of nonsubscription excess capacity services on ITFS facilities. This requirement will apply to all nonsubscription ITFS excess capacity service offerings, regardless of the potential regulatory classification of such service, be it broadcast or otherwise.[8]

TIE - BREAKER FOR THE COMPARATIVE SELECTION PROCEDURE

5. In response to an increasing demand for ITFS facilities, the Commission adopted a comparative selection procedure for ITFS in *ITFS Order*, *supra*. By this procedure, the Commission comparatively judges applicants for mutually exclusive facilities based on specified criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum had been established. *Id.* at 65-72. The specific criteria were ranked in order of importance and assigned numerical values. The applicant with the highest point accumulation is granted the license. For cases in which the most

qualified applicants are not distinguished by these criteria, the Commission intended to select among them by random-selection lottery, with each of the tied parties enjoying an equal chance of winning. *Id.* The Commission stated that this did not constitute a "system of random selection." Rather, it was intended as an *ad hoc* tie-breaker to be utilized only in those cases in which the primary selection procedure, which included consideration of all of the relevant qualifications for evaluating and comparing applicants, failed to establish a meaningful distinction among competing applicants. *Id.* at 67, 68. Accordingly, the Commission concluded that the Lottery statute, with its mandatory minority and diversity preference provisions, did not apply to this tie-breaker lottery.

6. The Court rejected the use of an unweighted lottery to break ties in comparative cases. After noting the number of comparative factors and the limited range of mathematically possible results that contribute "to a greater need for a tie-breaker lottery," the Court believed that there would be a deadlock in many cases, and that "the ITFS selection procedure appears to constitute a 'system of random selection' purposely designed to bypass the time and resource-consuming process of traditional comparative hearings." *TRAC v. FCC*, *supra* at 1358. It concluded that the lottery aspect of such a system must include the preferences specified in the Lottery statute. *Id.* at 1361.

7. The Court has thus correctly inferred that the point system was specifically designed to avoid traditional evidentiary hearings in comparative cases.[9] However, this system was not designed to result intentionally in a large number of deadlocks. After thorough consideration and complete analysis of all proposals, the Commission explicitly limited its criteria to only those which it determined could reliably predict the best possible operators of this unique service. Numerous proposed criteria were specifically rejected as irrelevant or unreliable, and the Commission concluded that random selection among equally qualified applicants was preferable to awarding the license on the basis of a minor or arbitrary difference among applicants.

8. The Court has found no fault with the Commission's basic comparative selection procedure or with the Commission's analysis of the appropriate comparative criteria for ITFS. Our own confidence in the ability of this selection system and its criteria to determine consistently and fairly the applicant most qualified to provide the most effective ITFS service remains unchanged.[10] In response to the Court's rejection of the Commission's tie-breaker process, however, a secondary comparative selection criterion is proposed for those cases in which the criteria already found by the Commission to be most relevant and reliable fail to distinguish among competing applicants.

9. Specifically, it is now proposed that when comparative applicants are otherwise indistinguishable, the contested authorization will be awarded to the applicant which proposes to serve the greatest number of students. The Commission previously rejected this criterion for comparative evaluation, stating that the quantity of use should not be stressed over quality of use. *ITFS Order*, *supra* at 71. However, the use of this criterion in the manner proposed here, *i.e.*, as a secondary factor, would stress quantity only if the predictors of "quality" of use fail to distinguish among the applicants. Additionally, when this criterion was rejected previously, the Commission did not consider that such a comparative consideration could have the salutary effect of encouraging applicants to extend the reach of their services to include additional schools and students. Even with this in mind, we continue to believe that this criterion is not as significant as those already adopted, and it is not proposed for use as a primary comparative criterion for all cases. However, it can be relevant in predicting the entity best able to meet the educational and instructional needs of a community when the characteristics which the Commission considers first have not indicated that one applicant is more qualified than another in this regard. Moreover, while its utility in selecting the more capable applicant may be questionable in some cases, it is not likely to lead to selection of an inferior applicant. Our initial review of the criteria previously considered does not suggest any others with similar merit.

10. Interested parties are requested to propose the formula by which this criterion should be applied. Among the specific issues which should be addressed are the following: If an applicant is a consortium, school board, or educational board or commission, should the Commission consider total enrollment of all schools which are members of the applicant or over which the applicant has partial or absolute authority regarding curriculum? Should the Commission consider on an equal or fractional basis the enrollment of nonapplicant schools which will be served by the applicant? If so, should this include all schools listed as receive sites or only those from which "letters of reasonable assurance"[11] have been submitted? As of what date(s) should enrollment be counted and considered? What source or form of enrollment information is sufficiently reliable and ascertainable so as to be dispositive? Should the Commission limit its consideration to only the number of students in specific classes which will be using ITFS programs? Should the Commission derive a formula to consider only proposed "student/hours" of use, based on proposed ITFS class schedules? Regardless of the formula adopted, should the difference among applicants be required to reach some minimum percentage before it is considered of sufficient significance to justify a selection among competing applicants for an authorization?

11. The Commission is inclined to consider some variation on total enrollment, rather than a prediction of actual student/hours or number of actual classes, as its secondary comparative criterion. The first figure is more static, more certain, and more susceptible of proof. It represents the greatest possible use by parties already determined by other criteria to have the best potential for providing the most valuable educational service. The latter figures are more variable over time and more difficult to evaluate and establish. They represent conditions with greater short-term fluctuation, less predictability, and a greater possibility of exaggeration, whether intentional or not. They also introduce the possibility of greater Commission oversight of licensee operations regarding levels of usage upon which a grant is based, and correspondingly could have the undesireable effect of reducing licensee freedom to modify usage patterns to make the most effective use according to internal evaluations. Interested parties should include these considerations in addressing the propriety of the proposed criterion and the exact form and formula in which it should be embodied.

12. It is expected that the formulation and application of this criteria will eliminate virtually all ties. To anticipate the possiblity, however remote, that a tie may remain even

after application of a secondary criterion, commenters are invited to suggest additional alternate criteria or procedures for a final, conclusive tie-breaker.

13. Commenters should bear in mind that the basic comparative selection process and the current criteria and their relative weights are not under consideration. Comments on modification of the selection system should be limited to the appropriate nature and formulation of the secondary criterion (or criteria) to be adopted. Commenters may also suggest any other secondary criteria or conclusive tie-breaker criterion or procedure they consider pertinent to the ITFS licensing scheme. Criteria previously proposed in the Rule Making proceeding will also be reviewed and need not be repeated by commenters.

14. The National Association for the Advancement of Colored People (NAACP) and others, including Hispanic Information and Telecommunications Network, Inc. (HITN), an ITFS licensee, permittee, and applicant, have requested a stay of any Commission response to the Court's remand until NAACP, *et al.* file a petition for Rule Making or supplemental information. They state that their petition or supplemental information will request the Commission to accept comments from interested parties in reconsidering its rules in response to the Court's decision. NAACP also requests that the Commission stay the processing of all minority-controlled ITFS applications. For now, it is sufficient to note that further comment has been solicited regarding the aspects of the comparative selection process that were addressed by the Court. The processing of minority-controlled applications is not affected by this Order and Notice, and such applications will continue to be processed under existing rules. The only applications that warrant deferral pending the conclusion of this proceeding are those in which applicants that are entitled to comparative consideration are found to be tied after employment of the existing comparative criteria. The Commission's procedure for regulation of nonsubscription service on ITFS excess capacity is directly and fully responsive to the Court's expressed concerns, and no further Rule Making or other consideration is necessary. For these reasons, NAACP's motion for stay is dismissed.

PROCEDURAL MATTERS

15. *Regulatory Flexibility Act Initial Analysis.* Pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980, it is hereby certified that the proposed rules, if adopted, will not have a significant economic impact on a substantial number of small entities. The only impact will be the occasional requirement of the submission of additional data from applicants. For those cases in which additional data is required, ease and simplicity of ascertainment, assembly and submission are essential elements of any rule which the Commission will adopt.

16. *Paperwork Reduction Act Analysis.* In our estimation, the requirement that ITFS operators notify the Commission prior to offering nonsubscription excess capacity services on ITFS facilities will affect nine or fewer persons annually. Therefore, this request for information is not subject to the requirements of Section 3507 of the Paperwork Reduction Act of 1980, Public Law 96-511, (44 U.S.C. 3507).

17. For purposes of this nonrestricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda Period. *See generally*, 47 C.F.R. §1.1206(a). The Sunshine Agenda Period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. §1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. §1.1203. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. §1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or agruments not already reflected in that person's previously filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. 47 C.F.R. §1.1206.

18. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules (47 C.F.R. §§1.415, 1.419), interested parties may file comments on or before **September 22, 1988,** and reply comments on or before **October 12, 1988.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C.

19. This *Order and Second Further Notice of Proposed Rule Making* is issued pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended. (47 U.S.C. §§4(i), 303.)

20. Accordingly, IT IS ORDERED, That the Motion for Stay filed by NAACP and others IS DISMISSED.

21. IT IS FURTHER ORDERED, That the Office of the Managing Director SHALL SEND to the Chief Counsel for Advocacy of the Small Business Administation the certification that the proposed action will have no significant economic impact on a substantial number of small entities.

22. For further information regarding this proceeding, contact the Distribution Services Branch of the Video Services Division, Mass Media Bureau at (202) 632-9356.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] ITFS stations are intended to be used primarily for the transmission of instructional and cultural material to specified receive sites for the formal education of students enrolled in accredited schools. On a secondary basis, other related ITFS uses are permitted. In addition, ITFS operators are permitted to use or lease for use their "excess capacity" (unused transmission time, typically available during evening and weekend hours) for non-ITFS purposes. 47 C.F.R. §74.931.

[2] Public Law 97-259, 96 Stat. 1087, Sept. 13, 1982 (47 U.S.C. §309(i)).

[3] *Public Broadcasting System ITFS Applications*, 96 FCC2d 555, 561 (1984).

[4] Subscription service has been determined to be a point-to-point service, not a broadcast service. *Report and Order* in Gen. Docket No. 85-305 (*Subscription Video*), 2 FCC Rcd 1001, n. 27 (1987); *aff'd, National Ass'n for Better Broadcasting v. FCC*, No. 87-1198 (D.C. Cir. decided June 17, 1988).

[5] In a related prior proceeding, the Commission authorized the use of the ITFS subchannels and vertical blanking interval, and recognized that private carrier and/or common carrier services offered over these frequencies could require separate application and regulation. *Report and Order* in Gen. Docket No. 80-112, 94 FCC2d 1203, 1255 (1983).

[6] In declining to affix a broadcast classification to ITFS service, the Commission specifically recounted the primary educational use and the excess capacity subscription use which it anticipated. It did not characterize nonsubscription services on the excess capacity of ITFS facilities. *ITFS Reconsideration Order*, *supra* at 1376.

[7] In the *Subscription Video* proceeding, the Commission concluded that, for subscription services, a single factor -- the subscription nature of the service -- is dispositive of the licensee's intent that its transmissions are not intended for the general public and, hence, are not broadcasting. *See* 47 U.S.C. §153(o). In contrast, the classification of nonsubscription services may require case-by-case examination of a multiplicity of facts and circumstances surrounding the transmissions to determine the transmitter's intent or other relevant classification factor(s). *See Subscription Video*, *supra*, at n. 19. The Commission has broad discretion to proceed by Rule Making or by *ad hoc* adjudication. *See, SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947); *Wisconsin* Gas Co. v. FERC, 770 F.2d 1144, 1166 (D.C. Cir. 1985); Southern Bell Telephone and Telegraph Co. v. FCC, 781 F.2d 209, n.8 (D.C. Cir. 1986). In the circumstances here, a case-by-case approach is clearly more appropriate.

[8] Because this notification requirement is procedural in nature, it will be imposed without prior notice and comment. 5 U.S.C. §553(b)(A).

[9] The Commission has, in fact, clearly so stated: "Notwithstanding the changed circumstances, we believe that the comments filed in response to the first Notice [of Proposed Rulemaking in MM Docket No. 83-523, 48 Fed. Reg. 29,553 (1983)], objecting to full hearings and 'first-come-first-served' procedures, were well founded and still apply. Given the nature of the service, full hearings are wasteful of our resources and those of the applicants . . . . Therefore, we propose to eliminate both methods from consideration as possible selection procedures." Further Notice of Proposed Rulemaking in MM Docket No. 83-523, 98 FCC2d 1249, 1263 (1984). See also ITFS Order, supra at 66, 67; ITFS Reconsideration Order, supra at 1369.

[10] The Commission has previously considered whether a Section 309(i) lottery for the ITFS service is "appropriate in the public service within the parameters set forth" in the legislative history of that statutory provision (H.R. Conf. Rep. No. 756, 97th Cong., 2d Sess. 37 (1982)). ITFS Order, supra at 71; ITFS Reconsideration Order, supra at 1373. There is no basis upon which to modify the determination not to apply that provision.

[11] To establish their eligibility, ITFS applicants which are not schools or educational entities serving their own enrolled students are required to submit letters from accredited schools to demonstrate that such schools will receive and use the applicant's formal educational programming. 47 C.F.R. §74.932, note 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

JOHN R. POWLEY File No. BMPCT-870717KF
File No. BMPCT-870717KG

For Extension of Time to Construct
Station KIIU-TV, Logan, Utah

For Extension of Time to Construct
Station KBSC-TV, Helena, Montana

ORDER

Adopted: July 13, 1988; Released: July 27, 1988

By the Commission:

1. The Commission has before it for consideration: (a) the September 25, 1987, action of the Chief, Video Services Division, denying the above-captioned applications of John R. Powley for extensions of time within which to construct Stations KIIU-TV, Channel 12, Logan, Utah, and KBSC-TV, Channel 10, Helena, Montana, cancelling his construction permits, and deleting the call signs; (b) the December 14, 1987, action of the Chief, Video Services Division, denying reconsideration of that action; and (c) Powley's January 25, 1988, consolidated application for review of those actions.

2. We have reviewed the actions of the Chief, Video Services Division, and we conclude that the matters were fairly considered and properly decided under applicable precedent. Accordingly, IT IS ORDERED, That, pursuant to Section 1.115(g) of the Commission's Rules, Powley's consolidated application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS
TRANSMISSION,
INC.

Motion for Clarification

ORDER

Adopted: June 17, 1988; Released : July 27, 1988

By the Chief, Common Carrier Bureau:

1. On March 25, 1988, Communications Transmission, Inc. (CTI) filed a motion for clarification of an Order released by the Common Carrier Bureau on March 8, 1988. Bell Atlantic Telephone Companies, DA 88-314, released Mar. 8, (1988) (*Order).* Specifically, CTI seeks to clarify that there is no requirement that a dominant carrier which leases fiber optic cable file a tariff with the Commission because such cable does not provide, and as leased is not capable of providing, wire communications. CTI Motion at 1. For the reasons given below, we dismiss the motion.

2. The filing of a motion for clarification is not contemplated by the Commission's Rules.[1] *See generally* Part 1 of the Commission's Rules, 47 C.F.R. § 1 *et. seq.* Moreover, while the Commission's Rules provide for some flexibility in its procedures, *see, e.g.,* Section 1.41, 47 C.F.R. § 1.41, they cannot accommodate an unauthorized pleading of this nature. Exchange Carrier Association, Inc., DA 88-652, released May 2, 1988.

3. CTI's motion is also deficient on the merits. CTI asks the Commission to clarify a particular point it claims is discussed in the *Order.* The issue raised by CTI, however, was not discussed in the *Order.* The *Order* addressed issues raised by Locate Telecommunications, Inc. (Locate) in its petition to reject or suspend Bell Atlantic Transmittal Nos. 224 and 226.[2] Locate had questioned whether the tariffs were unlawfully discriminatory and whether cost support data were adequate. The issue of tariffing fiber optic cables was not raised in its petition or discussed in the *Order.* Thus, even were we to entertain CTI's motion, the Order contains no material relevant to the motion, and therefore nothing to clarify. Given CTI's concerns, it should have filed a petition for declaratory ruling pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, or a petition for Rule Making,pursuant to Section 1.401 of the Rules, 47 C.F.R. § 1.401.

4. Accordingly, IT IS ORDERED that the motion for clarification filed by Communications Transmission, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] CTI did not cite a section of the Rules as authority for filing its motion.

[2] Bell Atlantic Transmittal Nos. 224 and 226 proposed individual case basis rates for DS3 service for various customers.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MULTI-MICRO

For Authority to Construct and Operate
Multichannel Multipoint
Distribution Service Stations on the
F-channel group at

	File Nos.
Bakersfield, CA	9357-CM-P-83
Baltimore, MD	9358-CM-P-83
Daytona Beach, FL	9392-CM-P-83
Gainsville, FL	9414-CM-P-83
Lake Charles, LA	9442-CM-P-83
Sacramento, CA	9501-CM-P-83
Utica/Rome, NY and	9532-CM-P-83
Worchester-Fitchburg-Leominister, MA	9542-CM-P-83

MEMORANDUM OPINION AND ORDER

Adopted: July 19, 1988; Released: July 27, 1988

By the Chief, Domestic Facilities Division:

1. This proceeding concerns several Petitions to Deny filed against the above-referenced Multichannel Multipoint Distribution Service (MMDS) applications of Multi-Micro (Multi-Micro). Multi-Micro is the F-channel group MMDS lottery winner in ten markets. Petitions to Deny have been filed against Multi-Micro's applications in eight markets: (1)Bakersfield, CA (MSA), (2) Baltimore, MD (MSA), (3) Daytona Beach, FL (MSA), (4) Gainsville, FL (MSA), (5) Lake Charles, LA (MSA), (6) Sacramento, CA (MSA), (7) Utica-Rome, NY (MSA), and (8) Worchester-Fitchburg-Leominister, MA (NECMA).[1] Post-lottery Petitions to Deny Multi-Micro's applications were filed in each of these markets by the Committee for Fair MDS Lotteries (the Committee). In addition, United Cable Television of Baltimore, along with United Cable Television of Baltimore Limited (hereinafter referred to as "United), and Greater Media MDS (collectively referred to as "Petitioners) filed Petitions to Deny Multi-Micro's Baltimore and Worchester applications, respectively. Responses were filed by Multi-Micro to these pleadings.

2. The allegations raised by each of the Petitioners against Multi-Micro are virtually identical to those raised by the Committee against Multi-Micro and others in *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987) (hereinafter referred to as "VCI). In that proceeding, the Committee maintained that Multi-Micro, along with fifteen other MMDS applicants and a non-applicant, Bruce Merrill,[2] had engaged in a concerted, organized effort to skew their odds of lottery selection in several markets by the filing of essentially identical applications in violation of our policy against the filing of multiple applications by the same applicant in the same market. This policy is reflected in Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the "one-to-a-market" rule. The Committee took the position that the events leading up to the filing of the "cookie-cutter" applications, the familial or business relationships among certain applicants, the central role that several of the applicants played in the preparation of the applications for filing, and the similarities in technical and other information among the applications should lead the Commission to conclude that Multi-Micro and each of the other applicants had failed to disclose the identity of the real-party (or parties)-in-interest to the applications in violation of Section 21.13(a) of Commission Rules, 47 C.F.R. § 21.13 (a). In addition, the Committee alleged that the applicants had failed to submit a non-affiliation statement indicating whether there is any affiliation or relationship to any intended or likely subscriber or program originator as required by Section 21.900 of the Commission's Rules. As a remedy for these purported violations, the Committee sought the dismissal of the over 3,250 MMDS applications filed by these applicants in over 200 markets. Alternatively, the Committee requested that the issues be designated for hearing because they raised a substantial and material question of fact regarding the applicants' qualifications to be Commission licensees.

3. In denying the Committee's Petition in *VCI*, the Commission found with respect to purported violations of Sections 21.13(a) and 21.901(d)(2) that (1) the interrelationships among the applicants, the ownership organizational structures of the applicants, nor the circumstances surrounding the preparation of the applications raised a substantial or material question of fact, either individually or collectively, sufficient to raise real party-in-interest concerns, and (2) no violation of the one-to-a-market rule based upon the evidence presented was demonstrated. Multi-Micro responded to these allegations in the *VCI* proceeding. None of the allegations raised by the Petitioners' or evidence to support their claims in the instant proceeding relating to these two issues is substantially different from those raised in *VCI*. To a large extent, the arguments made by United Video and Greater Media MDS incorporate by reference the allegations made by the Committee in *VCI*. Consequently, we hereby reject Petitioner's contentions relating to violations of the real-party-in-interest and one-to-a-market rules for the reasons provided in the *VCI* decision. [3]

4. *Letter of Understanding*. At the time of filing, the "lead" application filed by Multi-Micro contained a "Letter of Understanding" signed by Dale Kipp, President and sole proprietor of Multi-Micro, stating that in consideration of (1) MerrillCom's overall assistance and (2) MerrillCom's assistance in obtaining financing for the construction and operation of any MDS license authorization obtained by the applicant, the applicant agrees to make available to MerrillCom, consistent with the terms and conditions contained in their final tariff, "six MHz-channels of MMDS transmission service on a 24 hours-a-day, 7 days-a-week basis in any service area for which the applicant obtains the requisite FCC authorization(s)". Petitioners maintain that this letter demonstrates Bruce Merrill's potential for control or influence over the operation of Multi-Micro's proposed facilities in violation of our real party-in-interest rules, and furthermore legally binds the applicants to lease channels to MerrillCom. In re-

sponse. Multi-Micro contends that this letter does not legally bind it, in any way, to give Bruce Merrill or MerrillCom the right to control the operation of its MMDS facilities. By affidavit, dated November 11, 1985, Bruce Merrill concurs with Multi-Micro in its characterization of the letter as a non-binding document.[4]

5. The Commission's decision in *VCI* held that the letter did not place Bruce Merrill in a position of control over, nor give Merrill a cognizable interest in, the applications. Nevertheless, it found that the letter, despite its disputed legal effect, strongly suggested that the applicants intended to reserve transmission time and channel capacity for the exclusive use of MerrillCom in consideration of MerrillComm's assistance in preparing the applications. Hence, the letter was found to raise questions regarding the applicant's intent to comply with Section 202(a) of the Act that provides "it shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in changes, practices, classifications . . . or to make or give any undue or unreasonable preference or advantage to any particular person . . . " 47 U.S.C. §202(a). As a result, the Commission found that the public interest would best be served by imposing a condition on any MMDS license issued to VCI or any of the other applicants, including Multi-Micro, requiring the holding out of the service to the public generally for a period of 60-days from the date their formal tariffs are effective. During that 60-day period, the licensees may not accept Bruce Merrill or MerrillCom, or any entity in which Bruce Merrill is affiliated as a customer-programmer. After the initial 60-day public offering, the permittees would be free to lease any remaining capacity to Merrill. *See VCI*, 2 FCC Rcd 1885, 1900. We remind Multi-Micro that this condition, imposed by the Commission in the *VCI* decision, remains applicable to any MMDS authorization issued to it.[5]

6. Accordingly, It IS ORDERED that the Petitions to Deny the MMDS applications of tentative selectee, Multi-Micro filed by the Committee for Fair MDS Lotteries ARE DENIED.

7. IT IS FURTHER ORDERED that the Petitions to Deny the application of Multi-Micro filed by United Cable Television of Baltimore along with United Cable Television of Baltimore Limited and Greater Media MDS ARE ALSO DENIED.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Public Notices announcing Multi-Micro's lottery selection:

(1)Baltimore, MD lottery, October 29, 1985, Public Notice, Mimeo No. 0653, released November 1, 1985; (2) Daytona Beach, FL lottery, February 24, 1986, Public Notice, Mimeo No. 2818, released February 26, 1986; (3) Gainsville, FL lottery, March 28, 1986, Public Notice, Mimeo No. 3492, released April 1, 1986; (4) Bakersfield, CA lottery, April 28, 1986, Public Notice, Mimeo No. 4148, released April 29, 1986; (5) Lake Charles, LA and Utica-Rome, NY lotteries, May 28, 1986, Public Notice, Mimeo No. 4824, released May 29, 1986; and, (6) Worchester-Fitchburg-Leominister, MA lottery, June 27, 1986, Public Notice, Mimeo No. 5502, released July 1, 1986.

[2] Bruce Merrill is the Chairman of the Board of Directors and sole sharehold of Merrill Communications (MerrillCom), a customer/programmer of single-channel Multipoint Distribution Service.

[3] 2 FCC Rcd 1885, 1897-1899.

[4] In addition, the Committee contends that the programming arrangement contemplated by the letter of understanding violated the non-affiliation restriction contained in Section 21.903(b)(2) (the fifty-percent rule) which, at the time the instant Petitions were filed, precluded a licensee from leasing 50% or more of its transmission time and capacity to an affiliated party. It is not clear how much, if any, of Multi-Micro's capacity will be leased to MerrillCom. Moreover, the Commission, in 1987, eliminated the Section 21.903 (b)(2) non-affiliation rule. *See* Revisions to Part 21 of the Commission's Rules regarding the Multipoint Distribution Service (CC Docket 86-179), 2 FCC Rcd 4251 (1987). As a consequence, should MerrillCom lease any transmission time and capacity from Multi-Micro, on a common carrier basis, we will then determine whether such arrangement is consistent with the licensee's self-designated common carrier status.

[5] Our records reflect that Multi-Micro has elected to provide its' service offerings on a common carrier basis.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.

Petition for Waiver of Section 69.4(b) and Subparts B and C of Part 69 and Section 61.38 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: July 15, 1988; Released: July 27, 1988

By the Chief, Common Carrier Bureau:

1. The National Exchange Carrier Association, Inc., (NECA) filed a petition for waiver of the above-captioned sections of the Commission's Rules on March 30, 1988 (Waiver Petition). The waiver would permit NECA to establish a separate rate element applicable to all 700, 800, and 900 Services, which use the same access code NXX translation provided by exchange carriers participating in NECA's traffic sensitive pool. No other pleadings were filed. We grant NECA's waiver request.

2. In its petition, NECA states that it requires the waiver in order to establish a new rate element and a non-recurring charge for an Interim NXX Translation Optional Feature. Waiver Petition at 1. This new rate element would replace the current rate element for Interim 800 Translation with a generic rate element applicable to both 800 and 900 Services, which are currently available, and to 700 Service, which will be available in the future. We granted NECA a waiver to establish a separate rate element and non-recurring charge for Interim 800 Translation in 1986.[1] This optional feature is available to customers utilizing access services for the provision of 800 Service to end users.[2] NECA states that since it has begun offering this optional feature, other entities have begun to offer 900 Service requiring NXX translation functions identical to those performed by the exchange carriers in connection with Interim 800 Translation. *Id.* at 2.

3. According to NECA, the translation function for 900 Service is the same as that provided for Interim 800 Service and will be the same as that for future 700 Service. NECA maintains that it plans to modify its tariff to apply the same rate element – Interim NXX Translation Optional Feature – to all NXX access service code translation functions. NECA intends to file such modifications upon grant of this waiver. In addition, NECA states that it intends to revise its tariff, as necessary, as interexchange carriers develop additional services requiring the same or similar NXX translation functions. *Id.* at 3 n.3.

4. As indicated above, the Bureau has already granted NECA a waiver of Part 69 of the Rules to establish charges for Interim 800 access. *See* note 1, *supra*. Therefore, NECA suggests that a modification of that waiver, rather than the grant of an additional waiver, might be appropriate. NECA also requests a waiver of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, for its future filing of the non-recurring charge for Interim 900 Translation. As indicated above, the functions involved in providing 900 NXX code translations are identical to those used for Interim 800 NXX translation. NECA states that because 900 Service is relatively new, there is insufficient demand data for it to furnish Section 61.38 data. Therefore, NECA asserts that application of the interim 800 translation rate element to the identical functions provided for 900 Service is reasonable and will allow provision of the necessary NXX translation functions by NECA traffic sensitive pool members on a timely basis. Waiver Petition at 3.

5. The Bureau has granted several other waiver requests, including one by NECA, of a similar nature.[3] In so doing, the Bureau determined that the public interest would be served by permitting an exchange carrier to employ a separate rate element to recover the costs of providing interim 800 and 900 access services.[4] Therefore, this request for a waiver should similarly be granted. We also agree with NECA that a modification of its existing waiver, rather than a grant of a new waiver, is appropriate here, upon condition that NECA revise its tariff accordingly as interexchange carriers develop additional services requiring the same or similar NXX translation functions. NECA indicates that it intends to comply with this condition if we grant a modification of its existing waiver. Finally, NECA's request for a waiver of Section 61.38 of the Rules is also granted to afford NECA additional time to gather demand data for the Interim 900 Translation feature.

6. Accordingly, IT IS ORDERED that the waiver granted to the National Exchange Carrier Association, Inc., on October 24, 1986, is hereby modified to include separate rate elements for 700 and 900 Services.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] National Exchange Carrier Association, Inc., Mimeo No. 0328, released Oct. 24, 1986.

[2] The interim NXX translation rate element permits NECA members to recover non-recurring costs associated with programming central offices to perform the necessary translation functions, as well as other network modifications needed to route 800 Service calls to interexchange carriers. Waiver Petition at 2.

[3] Mountain States Telephone and Telegraph Co., Mimeo No. 4560, released May 16, 1986 (rate element for 800 Service); New York Telephone Company, DA 88-315, released Mar. 9, 1988 (rate element for 900 Service); Ameritech Operating Companies, 2 FCC Rcd 4217 (1987) (rate element for 900 Service).

[4] Mountain States Telephone and Telegraph Co., *supra* at paras. 10, 11.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

FORTUNA SYSTEMS
CORPORATION

For Authority to Construct and Operate
Multichannel Multipoint Distribution
Service Stations on the E-channel
group at

	File Nos.
Allentown-Bethlehem, PA	4456-CM-P-83
Corpus Christi, TX	4500-CM-P-83
Lynchburg, VA	4566-CM-P-83
Mansfield, OH	4569-CM-P-83

MEMORANDUM OPINION AND ORDER

Adopted: July 19, 1988; Released: July 27, 1988

By the Chief, Domestic Facilities Division:

1. This proceeding concerns several Petitions to Deny filed against the above-captioned Multichannel Multipoint Distribution Service (MMDS) applications of Fortuna Systems Corporation (FSC). FSC is the E-channel MMDS lottery winner in these markets. Post-lottery Petitions to Deny Multi-Micro's applications were filed against each of FSC's applications by the Committee for Fair MDS Lotteries (the Committee). A response to the issues raised in these pleadings was filed by FSC.[1]

2. The allegations raised by the Committee against FSC are virtually identical to those raised by the Committee against FSC and others in *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987) (hereinafter referred to as "VCI). In that proceeding, the Committee maintained that FSC, along with fifteen other MMDS applicants and a non-applicant, Bruce Merrill,[2] had engaged in a concerted, organized effort to skew their odds of lottery selection in several markets by the filing of essentially identical applications in violation of our policy against the filing of multiple applications by the same applicant in the same market. This policy is reflected in Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the "one-to-a-market" rule. The Committee took the position that the events leading up to the filing of the "cookie-cutter" applications, the familial or business relationships among certain applicants, the central role that several of the applicants played in the preparation of the applications for filing, and the similarities in technical and other information among the applications should lead the Commission to conclude that FSC and each of the other applicants had failed to disclose the identity of the real-party (or parties)-in-interest to the applications in violation of Section 21.13(a) of Commission Rules, 47 C.F.R. § 21.13 (a). In addition, the Committee alleged that the applicants had failed to submit a non-affiliation statement indicating whether there is any affiliation or relationship to any intended or likely subscriber or program originator as required by Section 21.900 of the Commission's Rules. As a remedy for these purported violations, the Committee sought the dismissal of the over 3,250 MMDS applications filed by these applicants in over 200 markets. Alternatively, the Committee requested that the issues be designated for hearing because they raised a substantial and material question of fact regarding the applicants' qualifications to be Commission licensees.

3. In denying the Committee's Petition in *VCI*, the Commission found with respect to purported violations of Sections 21.13(a) and 21.901(d)(2) that (1) the interrelationships among the applicants, the ownership organizational structures of the applicants, nor the circumstances surrounding the preparation of the applications raised a substantial or material qustion of fact, either individually or collectively, sufficient to raise real party-in-interest concerns, and (2) no violation of the one-to-a-market rule based upon the evidence presented was demonstrated. FSC responded to these allegations in the *VCI* proceeding. [3] None of the allegations raised by the Petitioners' or evidence to support their claims in the instant proceeding relating to these two issues is substantially different from those raised in *VCI*. Consequently, we hereby reject Petitioner's contentions relating to violations of the real-party-in-interest and one-to-a-market rules for the reasons provided in the *VCI* decision.[4]

4. *Letter of Understanding.* At the time of filing, FSC's "lead" application contained a "Letter of Understanding" (Exhibit M) signed by Kenneth R. Moeller stating that in consideration of (1) MerrillCom's overall assistance and (2) MerrillCom's assistance in obtaining financing for the construction and operation of any MDS license authorization obtained by the applicant, the applicant agrees to make available to MerrillCom, consistent with the terms and conditions contained in their final tariff, "six MHz-channels of MMDS transmission service on a 24 hours-a-day, 7 days-a-week basis in any service area for which the applicant obtains the requisite FCC authorization(s)". Petitioners maintain that this letter demonstrates Bruce Merrill's potential for control or influence over the operation of FSC's proposed facilities in violation of our real party-in-interest rules, and furthermore legally binds the applicants to lease channels to MerrillCom. In response, FSC contends that this letter does not legally bind it, in any way, to give Bruce Merrill or MerrillCom the right to control the operation of its MMDS facilities. By affidavit, dated November 11, 1985, Bruce Merrill concurs with FSC in its characterization of the letter as a non-binding document.[5]

5. The Commission's decision in *VCI* held that the letter did not place Bruce Merrill in a position of control over, nor give Merrill a cognizable interest in, the applications. Nevertheless, it found that the letter, despite its disputed legal effect, strongly suggested that the applicants intended to reserve transmission time and channel capacity for the exclusive use of MerrillCom in consideration of MerrillComm's assistance in preparing the applications. Hence, the letter was found to raise questions regarding the applicant's intent to comply with Section 202(a) of the Act that provides "it shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in changes, practices, classifications . . . or to make or give any undue or unreasonable preference or advantage to any particular person . . . " 47 U.S.C. §202(a). As a result, the

Commission found that the public interest would best be served by imposing a condition on any MMDS license issued to VCI or any of the other applicants, including FSC, requiring the holding out of the service to the public generally for a period of 60-days from the date their formal tariffs are effective. During that 60-day period, the licensees may not accept Bruce Merrill or MerrillCom, or any entity in which Bruce Merrill is affiliated as a customer-programmer. After the initial 60-day public offering, the permittees would be free to lease any remaining capacity to Merrill. *See VCI*, 2 FCC Rcd 1885, 1900. We remind Fortuna Systems Corp. that this condition, imposed by the Commission in the *VCI* decision, remains applicable to any MMDS authorization issued to it.[6]

6. Accordingly, It IS ORDERED that the Petitions to Deny the MMDS applications of tentative selectee, Fortuna Systems Corp. filed by the Committee for Fair MDS Lotteries ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Public Notices announcing FSC's lottery selection: (1) Allentown-Bethlehem, PA lottery, May 28, 1986, Public Notice, Mimeo No. 4824, released May 29, 1986; (2) Corpus Christi, TX lottery, March 28, 1986, Public Notice, Mimeo No. 1798, released January 6, 1986; (3) Lynchburg, VA lottery, March 28, 1986, Public Notice, Mimeo No. 3492, released April 1, 1986; and (4) Mansfield, OH lottery, April 28, 1986, Public Notice, Mimeo No. 4148, released April 29, 1986.

[2] Bruce Merrill is the Chairman of the Board of Directors and sole sharehold of Merrill Communications (MerrillCom), a customer/programmer of single-channel Multipoint Distribution Service. Bruce Merrill is the uncle of Kenneth R. Moeller, member of the Board of Directors and 50% shareholder of FSC.

[3] Reply filed by Fortuna Systems Corp., December 13, 1985.

[4] 2 FCC Rcd 1885, 1897-1899.

[5] In addition, the Committee contends that the programming arrangement contemplated by the letter of understanding violated the non-affiliation restriction contained in Section 21.903(b)(2) (the fifty-percent rule) which, at the time the instant Petitions were filed, precluded a licensee from leasing 50% or more of its transmission time and capacity to an affiliated party. It is not clear how much, if any, of Multi-Micro's capacity will be leased to MerrillCom. Moreover, the Commission, in 1987, eliminated the Section 21.903 (b)(2) non-affiliation rule. *See* Revisions to Part 21 of the Commission's Rules regarding the Multipoint Distribution Service (CC Docket 86-179), 2 FCC Rcd 4251 (1987). As a consequence, should MerrillCom lease any transmission time and capacity from FSC, on a common carrier basis, we will then determine whether such arrangement is consistent with the licensee's self-designated common carrier status.

[6] Our records reflect that FSC has elected to provide its' service offerings on a common carrier basis.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

Peter Gimpel

ABC, CBS, and NBC
Television Networks

ORDER

Adopted: July 11, 1988; Released: July 27, 1988

By the Commission:

1. The Commission has before it an application for review filed by Peter Gimpel on March 14, 1988. Mr. Gimpel seeks review of a February 12, 1988, Mass Media Bureau letter ruling (appended), which denied his news distortion complaint against the major television networks concerning news coverage of the 1978 "Black Friday Massacre" in Iran.

2. After a careful review of the complaint, we believe that the Bureau's ruling was correct, and that the application for review does not contain sufficient grounds to warrant reversal or modification.

3. Therefore, pursuant to Section 1.115(g) of the Commission's rules, the application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

February 12, 1988

8330-Z
C11-112

Mr. Peter Gimpel
1409 Comstock Ave.
Los Angeles, California 90024

Dear Mr. Gimpel:

This is in response to your news distortion complaint against the ABC, CBS, and NBC networks.

You allege that each network conspired with the U.S. and Iranian governments and with various American print media, including the Associated Press, the New York Times, the Washington Post, Time, and Newsweek, to "suppress, cover up, falsify, distort, and slant news reports of . . . the Black Friday Massacre." You state that the massacre, which occurred on September 8, 1978, involved several hundred or perhaps thousands of unarmed Iranian civilians shot down by troops of the Shah of Iran during a peaceful political demonstration held in Jaleh Square in Tehran, Iran.

In support of your allegations, you claim that William Colby, former Director of the Central Intelligence Agency (CIA) admitted publicly having pressured American media to suppress or falsify particular stories. You also speculate that a CIA-instigated "response" by American news media was possible, because of U.S. Memorandum of Understanding with the Imperial Government of Iran to assist in a "Tehran disaster response plan," and you cite similar government attempts at prior restraint of press coverage by "informal pressure and cajolery." You also theorize that the following facts support your allegations of distortion:

1) The 1986 resignation of Bernard Kalb, U.S. Assistant Secretary of State for Public Affairs, over a reported government "disinformation" program;

2) The higher death tolls of the Black Friday massacre reported in European media, and a statement by the co-editor of *Der Spiegel* that there was considerable exchange of information among the press corps;

3) The arrest of Tehran manager of United Press International (UPI) by Iranian authorities, which you speculate was due to UPI's refusal to "further a conspiracy to falsify news about a civil emergency in Tehran in accordance with the Memorandum of Understanding";

4) The London Times' report of Iran's expulsion of a correspondent for *The Guardian* because of her "bias" against the Iranian regime, which you claim establishes that Iran took punitive action against the foreign press for failure to comply with the "Tehran disaster response plan";

5) A CBS report that a former press aids to the Shah defected to London shortly after the Black Friday Massacre, where he accused American journalists of accepting bribes for favorable reports about the Shah; and

6) The reported existence of photographs, which you believe rebut American press reports that 98 people, rather than thousands of people, were killed in the massacre.

You state that your requests for videotapes or transcripts of every news broadcast involving the numbers of victims of Black Friday have been either ignored or denied by all three networks, and that each has refused to take any "corrective action" in this matter. You conclude that as a result of the networks' actions, you have been denied your right to receive "politically relevant news" and, *inter alia*, deprived of the right to participate in the formulation of American foreign policy. You therefore request that the Commission conduct an investigation into the "nationwide media cover-up" and order the networks to take appropriate remedial action.

The Commission will respond to instances of intentional news falsification (distorting, rigging, slanting or staging) *only* when it receives specific extrinsic evidence of such falsification. *Hunger in America*, 20 FCC 2d 143, 150 (1969). By "extrinsic evidence," the Commission generally

means evidence outside the content of the program. This kind of evidence includes testimony, in writing or otherwise, from insiders or persons who have direct personal knowledge of an intentional attempt to falsify the news. Of particular concern would be extrinsic evidence revealing orders from the broadcaster, its top management, or its news management to falsify the news. Simply alleging that a report is "inaccurate" is not sufficient to warrant an investigation, as the Commission is neither the national arbiter of the "truth" of a news report nor the judge of the wisdom, accuracy, or adequacy with which it was handled on the air. *The Selling of the Pentagon*, 30 FCC 2d 150, 152 (1971); *Central Intelligence Agency*, 58 RR 2d 1944, 1949 (1985). In the absence of extrinsic evidence, the Commission has stressed that it will not intervene in such cases. *The Selling of the Pentagon*, *supra*, at 152.

In the instant case, you have provided no extrinsic evidence of deliberate news distortion by any of the networks. Rather, you have merely provided a comparative survey of American and European press coverage of the Black Friday massacre, congressional testimony concerning government disinformation programs, and various facts which you hypothesize support your theory of a nationwide cover-up. These fall short of actual "insider" information concerning this specific news story, *e.g.*, affidavits from employees of the networks attesting to orders from top management to intentionally distort the number of victims of the Black Friday massacre. Without such "insider" information, Commission intervention in such matters would pose a significant intrusion upon the broadcaster's First Amendment rights, and "would involve the Commission deeply and improperly in the journalistic functions of broadcasters." *See The Selling* of the Pentagon, supra.

In sum, you have not met the burden of presenting the Commission with a prima facie news distortion complaint. Therefore, there is no basis for Commission action at this time.

Sincerely,

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-331

In the Matter of

Amendment of Section 73.202(b), RM-6356
Table of Allotments,
FM Broadcast Stations.
(Duluth, MN)

ERRATUM

Released: July 27, 1988

On July 13, 1988, the Commission's Mass Media Bureau released a Notice of Proposed Rule Making (DA 88-1032) in the captioned proceeding. The present and proposed channel allotments were misprinted in that document and are correctly set forth below.

	Channel No.	
City	Present	Proposed
Duluth, Minnesota	225C1, 235C, 239C1, 255C1, 269A, 277C1, 286C1	225C1, 235C, 239C1, *247C2, 255C1, 269A 277C1, 286C1

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Transmittal No. 1194
Tariff F.C.C. No. 1

ORDER

Adopted: July 15, 1988; Released: July 19, 1988

By the Chief, Common Carrier Bureau:

1. On April 20, 1988, AT&T Communications (AT&T) filed Transmittal No. 1194, proposing an optional, two-part rate schedule (Schedule D) for its Software Defined Network (SDN) service. MCI Telecommunications Corporation (MCI)[1] and US Sprint Communications Company (Sprint)[2] filed petitions to reject or, in the alternative, to suspend and investigate. AT&T filed a reply on May 16, 1988. [3] The effective date of the tariff is July 19, 1988.

2. Under proposed Schedule D, customers will pay a flat monthly recurring charge of750 and receive a substantial discount off Schedule C SDN per minute rates for on-network usage between two locations served by special access facilities. Locations must be in two different LATAs and in two different states. Furthermore, the750 charge applies for each location pair specified by the customer.

3. According to Sprint, AT&T's proposed rates are discriminatory because the SDN Schedule D rates appear to be, on average, over 50 percent lower than AT&T's least expensive current SDN offering, Schedule C. Sprint claims that the services offered pursuant to Schedules C and D are identical and that the rates should therefore be comparable. Both MCI and Sprint argue that AT&T cannot justify its Schedule D rates on the basis of competitive necessity. While AT&T claims that the market for virtual network services is highly competitive, MCI and Sprint maintain that AT&T has approximately 31 percent of the market.

4. MCI also argues that the Schedule D rates do not conform with the requirements of Section 61.38 of the Commission's Rules. According to MCI, the rule requires that AT&T demonstrate that its proposed rates will result in recovery of fully distributed costs (FDC). It asserts that AT&T has failed to meet this requirement.

5. AT&T replies that its proposed SDN rates for Schedule D are cost-supported and non-discriminatory. According to AT&T, SDN service is subject to a significant amount of competition in the interexchange market. AT&T also disputes MCI's and Sprint's claims that its rates are discriminatory. It notes that Sprint compares only the average Schedule D rate with Sprint's lowest day rate for virtual private line network service and concludes that the average Schedule D rate is 20 percent lower than the comparable Sprint rate. AT&T maintains that Sprint's consideration of only Schedule D usage is erroneous because customers will not purchase Schedule D alone. AT&T concludes that if Schedule A, B, and C rates are included in the comparision, the actual average rates that will be charged SDN customers will be higher than both Sprint's and MCI's rates.

6. AT&T also maintains that MCI is incorrect in its assertion that AT&T should not have used the net revenue test to cost-justify its rates. AT&T argues that Schedule D rates for SDN resemble other optional rate plans because Schedule D is a two-part, Switched Services rate option, with a fixed monthly charge and reduced usage charges. Furthermore, AT&T asserts, its rates are also justified on an FDC basis. A service which covers its FDC, according to AT&T, cannot possibly result in cross-subsidization.

7. AT&T further asserts that it has satisfied the requirements of Section 61.38 of the Rules and that its economic support data demonstrate that, with the proposed rate changes, SDN will continue to recover its FDC. AT&T argues that its Predictive Fully Distributive Cost Study shows that this filing will significantly increase earnings for both the Switched Services category and total interstate earnings.

8. The Common Carrier Bureau has reviewed the tariff transmittal, the petitions, and AT&T's reply. We find that no compelling argument has been presented that the tariff proposal is patently unlawful so as to require rejection or that the proposal warrants investigation at this time.

9. IT IS THEREFORE ORDERED that the petitions against AT&T Communications Tariff F.C.C. No. 1, Transmittal No. 1194, filed by MCI Telecommunications Corporation and US Sprint Communications Company, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] MCI Petition To Reject or, in the Alternative, To Suspend and Investigate, filed May 5, 1988 (MCI Petition).

[2] US Sprint CommunicationsCompany, Petition To Reject or in the Alternative Suspend and Investigate, Filed May 6, 1988 (Sprint Petition).

[3] AT&T Reply, filed May 16, 1988 (AT&T Reply).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-400

In the Matter of

AT&T COMMUNICATIONS Tariff F.C.C. Nos. 9, 10 and 11

Transmittal Nos. 285, 318, 342, 346, 504 and 559

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 1988; Released: July 25, 1988

By the Chief, Common Carrier Bureau:

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I. BACKGROUND

1. The Commission initiated this investigation to examine the restructured American Telephone and Telegraph Company (AT&T) interstate private line tariffs that AT&T filed to reflect the effects of divestiture and the implementation of access charges.[1] The new tariff structure differed substantially from the pre-divestiture structure. AT&T created three new tariffs -- 9, 10 and 11 -- that encompass most of its private line offerings. AT&T Tariff No. 11 essentially represents a pass-through of charges AT&T incurs to obtain special access circuit components under local exchange carrier (LEC) special access tariffs. AT&T Tariff No. 9 describes the interexchange portion of the service that AT&T provides directly to its customers including AT&T customers who do not elect to obtain special access through AT&T. AT&T Tariff No. 10 provides supplemental information.

2. The Commission found that this basic structure appropriately reflects the effects of divestiture and access charges, but that many of the details of implementation require further inquiry. The *May 28 Order* denied petitions to reject or suspend the AT&T private line tariffs, established an accounting order, discussed subjects that appear to warrant investigation, and directed AT&T to file some reports. That Order also delegated authority to conduct the investigation to the Common Carrier Bureau.

3. This Bureau released a *Designation Order* on January 7, 1986,[2] which specified the issues for investigation with greater specificity and established a pleading cycle. The issues identified as requiring further investigation were specified as follows: (1) identification of functions and costs associated with nonrecurring charge (NRC) elements; (2) application, and possible functional overlap, of the access coordination function (ACF) and central office connection (COC) rate elements, and application of the Design Layout Report (DLR) element; (3) justification for the notice of discontinuance (NOD) rate element; (4) asymmetric treatment of the COC and digital local channel (DLC) rate elements in the context of Dataphone Digital Service (DDS); (5) asymmetric treatment of the COC and station connection (SC) rate elements in the context of television service, and other issues particular to that service; and (6) significant revisions to the rate loadings, by mileage band, imposed on interoffice channels (IOCs) generally. We subsequently expanded this investigation to determine the lawfulness of a rate adjustment factor (RAF) that AT&T applied to its Tariff No. 11 local channel recurring charges in a subsequent transmittal.[3]

4. We have carefully examined AT&T's explanation for each matter that was designated for investigation and the comments or oppositions relating to that subject.[4] We conclude that AT&T has made rational choices in designing the new rate structure that are consistent with the obligations that the Communications Act imposes upon common carriers. The tariff provisions and rates that we examined do not violate the relevant provisions of the Communications Act. We have also examined the supplemental pleadings on this question and find that the RAF procedure AT&T used is consistent with Communications Act requirements.[5] Therefore, we are terminating this investigation and the accounting order that was imposed in the *May 28 Order*.[6]

II. ANALYSIS AND DISCUSSION

A. *Designated Issues*

1. Nonrecurring Charges and Associated Rate Element Overlap

5. The costs incurred to establish or rearrange private line service have traditionally been recovered only partially from the nonrecurring charge assessed to the customer who orders the installation or rearrangement; the remainder of installation costs is indirectly recovered from recurring charges applied to customers generally. The partial recoupment of installation costs through recurring charges eases the initial burden on the individual customer, but at the same time generally burdens customers whose service arrangements are comparatively simple, or stable, with some of the installation costs imposed on the carrier by more complex, or more frequently rearranged, circuits. The cost support materials that AT&T filed with

the transmittals did not provide sufficient information to associate the nonrecurring charges imposed for specific rate elements with underlying cost factors. Those materials did not reveal which functions and costs are recovered by those elements, nor the extent to which the "nonrecoverable costs"[7] associated with establishing private line service are recouped through AT&T's nonrecurring charge elements.

6. AT&T Tariff No. 9 established the IOC and COC rate elements for service provided over its network facilities. While costs initially incurred to establish such service are recovered from both nonrecurring and recurring rate elements, the aggregate revenue requirement to be covered by charges for most of the various Tariff No. 9 rate elements is determined by AT&T's costs of providing its own network facilities. AT&T's Tariff No. 11 rates thus generally reflect the charges imposed under LEC tariffs for providing special access. Tariff No. 11 charges reflect the LECs' underlying, independent decisions apportioning their costs between recurring and nonrecurring rate elements.[8] The ACF is an exception to this fundamental bifurcation between access and interexchange functions. Although ACF is provided under Tariff No. 11, because such coordination is useful only in conjunction with special access channels, the ACF rate reflects AT&T's costs of coordinating LEC service components with its own network offerings. There is no counterpart LEC rate element underlying the ACF. Accordingly, the ACF element must be examined in order to determine whether the AT&T nonrecurring charges are reasonable and nondiscriminatory.

7. The *Designation Order* required AT&T to itemize separately the nonrecurring and one-time activities involved in establishing its ACF, COC, IOC, and certain optional rate elements (including the DLR) for voice grade and 1.5 Mbps service (*Designation Order* at para. 27) and to describe any significant differences in the activities or accounting treatment involved in providing other private line offerings. *Id.* at para. 28. That Order required AT&T to show the portion of total costs for ACF, COC, and IOC rate elements that are nonrecoverable, and the portion of nonrecoverable costs allocated to the corresponding nonrecurring rate elements. *Id.* at para 29. In addition, we required AT&T to compare the distinctive application of recurring and nonrecurring rate elements in three sub-categories of private line service: (1) common user services such as Accunet Packet Service (APS); (2) private line switching machine services such as Customer Controlled Switching Arrangements (CCSA); and (3) traditional private line transmission services. *Id.* at para. 30.

8. *AT & T Response*. The AT&T direct case describes, in both narrative and tabular form, the facilities and activities involved in establishing the functionality of the specified rate elements for its several private line services. The degree of specificity provided in AT&T's extensive response to the questions raised in paragraphs 27-28 of the *Designation Order*, in particular, enables detailed identification and comparison of specific facilities and associated work activities that are variously common and dissimilar with respect to individual services or groups of services.

9. AT&T states that records kept in the normal course of business do not identify the discrete costs of establishing service. It notes that neither the Commission's Interim Cost Allocation Manual (ICAM)[9] nor its own Private Line Cost System identifies nonrecoverable costs, and that neither the accounts specified by the Commission's Uniform System of Accounts[10] nor AT&T's internal accounting records are associated with specific rate elements. Thus, AT&T asserts, it is unable rigorously to establish nonrecoverable costs for circuit functionalities it provides directly, either generally or by rate element. For the same reason, AT&T states it cannot establish the portion of nonrecoverable costs that present nonrecurring charges recover. The nonrecurring charges "were not set by associating them with a particular dollar amount of underlying activity," but instead by consideration of the existing rate for comparable elements, anticipated customer reaction to increased nonrecurring charges, and estimated costs. AT&T Response at 29-1/29-2. AT&T has, however, provided "rough approximations" of the nonrecoverable costs associated with the ACF, COC, and IOC rate elements. AT&T states these approximations were developed by estimating the time required to perform work activities associated with the rate elements and multiplying these estimates by estimated labor rates. *Id.* at 29-3/29-4.

10. The AT&T response reveals that common user services are not provided as discrete switching and transmission components; a unitary usage rate is applied to the initial service period of 30 seconds and a distinct usage rate is applied to subsequent six-second periods. For Accunet Packet Service (APS) and High Speed Switched Digital Service (HSSDS), recurring and nonrecurring rate elements are applied on a per-port basis. *Id.* at 30-1, 30-2. Switching machine services (Enhanced Private Switched Communications Service (EPSCS), CCSA, and Switched Circuit Automatic Network (SCAN)) are used in conjunction with voice grade and Accunet- T1.5 transmission components to establish private networks; the discrete switching machine termination charges entail a nonrecurring element only for EPSCS -- rate elements applied to CCSA and SCAN are limited to recurring elements. *Id.* at 30-2, 30-3. Finally, the traditional transmission services, such as voice grade, Accunet- T1.5 and DDS entail no switching charges; transmission rate elements include recurring and nonrecurring elements for the COC component but only a recurring rate element for the IOC component. Consistent with AT&T's explanation (in response to paragraph 29) of the limited detail of data available, it provides similar estimates of the nonrecoverable costs for common user and switching machine services.

11. *Comments*. Dow Jones asserts that AT&T's response to paragraph 27 reveals that, apart from discrete facilities and equipment directly associated with AT&T central offices and interoffice channels, many one-time and recurring activities are common to the ACF, COC and IOC rate elements. Thus, Dow Jones notes AT&T's statement (AT&T Response at 27-12) that sales and customer service and billing activities do not differ for these three elements, though the time spent may vary between elements. Dow Jones Comments at 6-7. Dow Jones also states that all three rate elements entail engineering and operations activities (*e. g.*, the preparation and review of universal service order coding (USOC)); the IOC and COC elements alike require compatibility design activities; and the IOC and ACF both involve common activities for installation coordination, data entry, and engineering review. *Id.* Dow Jones asserts that engineering and customer service and billing activities are similar for the COC and ACF,

and engineering and operations activities associated with engineering service orders are common between the ACF and IOC.

12. Dow Jones next contends that AT&T has used arbitrary cost allocation measures to drive these common cost aspects "downstream," to the detriment of customers with large numbers of terminations. Specifically, Dow Jones asserts that AT&T allocates certain directly assignable expenses such as Sales Expense and Local Commercial Operations Expense, which are commonly involved in providing these rate elements, by first disaggregating these expenses to the service level on the basis of its Sales Time Reporting System (STRS). The costs that result are then disaggregated to the rate element level by allocation ratios reflecting demand quantities for particular rate elements. *See* AT&T Response, Att. A, at 7-8. While STRS disaggregates the time spent in a common activity before attributing it to the implicated rate elements on the basis of demand, Dow Jones contends it is unclear whether the STRS disaggregation process recognizes differences that may exist among the several rate elements. Dow Jones Comments at 7-9. In any case, Dow Jones contends that the latter stage of this approach disproportionately allocates such costs to rate elements (such as the ACF) that are assessed on a per-termination basis. In addition, according to Dow Jones, AT&T does not indicate that the discrete costs associated with rate element-specific subactivities are actually allocated to the respective rate elements. *Id.*

13. Ad Hoc states that AT&T "has not even attempted to respond" to the issues designated on nonrecurring charges, because the carrier fails to assign either dollar or time quantities to the work functions ascribed to the NRCs for particular rate elements. Ad Hoc Comments at 8. Ad Hoc also iterates AT&T's candid description of the disjunction between private line NRC levels and functional work categories. Arinc states that despite explicit Commission instructions to identify costs recovered by specific rate elements, and the portion of overall costs recovered by NRCs, AT&T concedes that its NRC price levels were set primarily by reference to previous rates rather than by the allocation of specific nonrecoverable costs to NRC elements – and so has no cost basis for setting NRC rates at any particular level. Arinc Comments at 4-6.

14. Ad Hoc further urges that while customers indeed cannot incur only an NRC, this is irrelevant to the reasonableness of NRC levels. Ad Hoc contends that AT&T's recitation in Attachment B of engineering design considerations that may pertain to multipoint circuits (and the corresponding incidence of NRCs for those rate elements applied on a per-termination basis) establishes no benchmark for comparison of multipoint and simpler circuits. Ad Hoc Comments at 9-11. Nor, according to Ad Hoc, is the application of ACF charges on a per-termination basis justified by AT&T's unsupported assertion that the ACF work functions "correlate" to the number of terminations. *See* AT&T Response at 13, 31-2. In sum, Ad Hoc states that AT&T's response effectively precludes the identification of service initiation costs, or the apportionment of this cost burden between recurring and nonrecurring rate elements; fails to establish the costs and work functions actually recovered through NRC rate elements, and those recovered by optional rate elements; and, thus, prevents the evaluation of possibly unreasonable discrimination effected by NRCs. Ad Hoc Comments at 11-12.

15. *Discussion.* As an initial matter, the fact that several activities are common to AT&T's principal rate elements fails to support the inference urged by Dow Jones that the separate rate elements are unreasonably developed or applied or otherwise conflict with the Commission's rate structure guidelines.[11] The presence of billing costs as an aspect of multiple rate elements, as an obvious example, simply reflects that charging for distinct rate elements will in each instance entail some use of the carrier's billing system; this, however, hardly suggests an artificial overlap between rate elements. Indeed, were AT&T in its schematic explanation or its cost allocation practices to restrict the incidence of such common functions to a more limited group of rate elements, it would obscure the underlying common cost factors necessary to provide these rate elements. Nor does the existence of common functional elements imply that the carrier failed adequately to unbundle functional components that are or could be independently useful to customers. Of central importance to the broad purposes of rate structure reform, no commenter has urged that any of the underlying functional activities undertaken and itemized by AT&T should be unbundled and provided under a distinct rate element.

16. The commonality of compatibility design activities, engineering review, or other activities mentioned by commenters, similarly fails to establish that there is an artificial overlap between rate elements. The private line provisioning process, particularly when it involves AT&T as the assembler of end-to-end arrangements from components initially furnished from different sources, inevitably entails significant work activities common to multiple rate elements.[12] Our review of the activities and specific equipment involved in providing the different rate elements confirms the considerable extent to which distinct cost factors are involved in the provisioning of the several rate elements. *See* AT&T Response at 27-1/27-45, 28-1/28-34.

17. The second contention advanced by Dow Jones characterizes AT&T's allocation of common activity costs to individual services as discriminating unreasonably against customers whose circuit arrangements entail multiple terminations. Dow Jones Comments at 8-9. We find, however, that the application of ACF and COC rate elements on a per-termination basis is reasonably related to the functionality actually provided by these elements.[13]

18. We also conclude that the relative level of nonrecurring and recurring charges does not unduly prejudice any group of ratepayers. The following table compares AT&T's estimated nonrecoverable costs with AT&T's nonrecurring charges.

Table I

Estimated Nonrecoverable Costs and Corresponding Tariff Charges[14]

Service	Central Office Connection		Access Coordination Function		Inter Office Channel[15]	
	Est. Cost	Tariff Rate	Est. Cost	Tariff Rate	Est. Cost	Tariff Rate
Accunet T1.5	365	310	780	207	1335	
DDS Service						
t1) 2.4/9.6	150	157	180	223	355	
56	160	237	240	276	485	
t2) 2.4/9.6	314					
56	476					
Wideband	130	106	240	47.75	570	
Voice Grade	145	134.65	140	149	370	
Telegraph	235	82.70	150	149	255	
Audio (Full-time)	40	4.25	155	53.05	1800	
Television (Full-time)	40	5.30	155	53.05	1960	

It appears from Table I that the NRCs are not excessive and that claims by customers such as Dow Jones that customers have been unduly prejudiced by increases in NRCs are unfounded.

19. The Commission has previously determined in the special access context that immediate, full recovery of nonrecurring costs from the directly benefitting customer is both consistent with the "strong policy attraction of developing rates that recover costs from the cost causer" and that the higher NRCs anticipated from adopting that approach would not portend a significant disincentive to market entry by new carriers in the interexchange marketplace.[16] At the same time, while cautioning local exchange carriers that the standard for evaluating NRCs would be whether they recover the costs incurred, the *NRC Order* recognized that below-cost NRCs are not inappropriate on a transitional basis, and encouraged LECs "to develop transitional approaches to moderate the impact of substantial NRC rate level increases where such rates are currently below full-cost recovery levels." *NRC Order*, 2 FCC Rcd at 3504 n.17. The *NRC Order*, however, explicitly declined to prescribe a particular transition approach. *Id.* at 3502.

20. Similar considerations lead us to conclude that we should not prescribe changes in AT&T NRCs at this time. AT&T should, however, endeavor to establish a closer relationship between nonrecoverable costs and NRCs in the future.

2. Application of ACF, COC, and DLR Rate Elements

21. The *Designation Order* [17] required that AT&T: (1) justify its decision to apply the ACF element on the basis of customer premises terminations, rather than on some basis sensitive to other aspects of particular circuit configurations; (2) describe the distinct costs and work activities entailed in providing the ACF for different services, specifically including different voice-grade arrangements and AT&T's experience with remotely bridged circuits;[18] (3) explain the extent to which different circuit configurations affect the service-specific work activities and costs delineated under (2); and (4) indicate the extent to which cost activities are recovered through recurring and nonrecurring elements. Essentially the same questions were directed to the application of the COC.[19] The *Designation Order* also required AT&T to provide technical characteristics of randomly sampled voice grade circuits as a basis for evaluating AT&T's determination to apply the nonrecurring charge for its DLRs on a per-circuit basis. In the following paragraphs, we consider the application of ACF and COC rate elements and related issues, before turning to contentions of overlap between these central elements, the application of the DLR element, and the issue of provisioning synchronization.

a. Application of ACF and COC Rate Elements

22. *AT & T Response*. The ACF comprises work activities required to coordinate access installation, test and maintain access, and sectionalize troubles. AT&T states that its application of the ACF element on a per-termination basis recovers the overall costs of coordinating circuit components, and is easily understood and administered. Recovery of ACF-related costs on a more circuit-specific basis would, according to AT&T, actually diminish the correlation between the work involved and the basis for application of the rate element. Rather than realizing economies of scale when coordinating the provision of multipoint circuits, for example, AT&T avers that engineering time and maintenance complexity generally increase with the number of terminations. AT&T Response at 31-2/31-3.

23. For example, when a circuit includes local channels bridged at a LEC facility, there must be a preliminary engineering design before AT&T prepares and sends requests for special access components to the LEC -- a step not involved when coordinating the provisioning of local channels that lack LEC bridging. (A final engineering design is still necessary after the LEC provides AT&T with firm order confirmation and a design layout report for LEC-furnished access facilities.) Further, when the presence of LEC bridging introduces additional mid-links, overall circuit redesign may be necessary.[20] AT&T Response at 31-3. The presence of LEC bridging between the customer premises and the AT&T office also reduces the efficiency of AT&T testing, because the bridge entails coordination with the LEC that is unnecessary when a LEC bridge is not involved. AT&T also asserts that reflecting the configuration of particular circuits in the application of the ACF would entail substantial additional rate structure complexity, as the number of customer premises terminations on a single multipoint circuit (arrangement) is "virtually unlimited," and this complexity would both create administrative burdens for the carrier and confound the Commission's rate structure guidelines.[21] *Id.* at 31-3/31-5.

24. The AT&T response itemizes the distinct activities entailed by provision of the ACF for individual services. AT&T asserts that the several voice grade arrangements listed in the *Designation Order* essentially involve different terminal equipment, but this does not affect the ACF element and "[n]o significant differences in costs or work in providing the ACF for these circuit arrangements have been identified." AT&T Response at 31-5. Finally, AT&T estimates nonrecoverable costs in its response to paragraph 29.[22]

25. The COC provides the physical connection, through an AT&T central office, between two service components.[23] The connection function entails transmission equipment, such as amplifiers and equalizers, pads and coils, and intra- and inter-building cabling, listed in detail in AT&T's response to paragraphs 27-28.[24] AT&T contends it is "appropriate to apply the COC once for each connection because this recovers AT&T's costs for the connection," and lists the principal activities and costs incurred to provide the COC, by service, in its extended response to paragraphs 27 and 28. It has estimated total fully distributed costs for providing the COC component of voice grade, telegraph, and Accunet' T1.5. services were estimated by studies based on AT&T's Private Line Cost System (PLCS). AT&T contends that application of its PLCS methodology, which is grounded in the ICAM investment allocation methods, is reasonable because the connections involved require the equipment noted above. AT&T also states that COC-related costs entailed in the provision of different voice-grade arrangements do not vary significantly. AT&T Response at 32-2/32-3. Finally, as with the ACF, AT&T's estimated nonrecoverable costs for the COC element are noted above in Table I.

26. *Comments*. Dow Jones repeats assertions that application of the ACF and COC elements "has been the primary source of unreasonable and burdensome rate increases for multipoint private line customers." Dow Jones Comments at 2. Dow Jones contends that while AT&T attempts to justify the application of ACF and COC elements on per-termination and per-connection bases, respectively, as required to recognize the greater "complexity" and associated costs of multipoint circuits, AT&T has not established the purported circuit complexity costs, or the reasonableness of recovering them through the ACF and COC elements. *Id*. at 10-13.

27. Dow Jones asserts that substantial overlaps exist "in the types of costs associated with each element" and states that AT&T's cost allocation practices fail to demonstrate any relationship between expenses and rate elements; nor, according to Dow Jones, has AT&T resolved questions respecting cost variations between circuit configurations and distinct services. Specifically, Dow Jones urges that one-way "broadcast" multipoint circuits, such as its newswire arrangement, involve substantial provisioning economies, compared to bridged multipoint data circuits, and contends such economies should be recognized by revisions to the AT&T rate structure. *Id*. at 13-16.

28. *Discussion*. Contrary to Dow Jones' contentions, AT&T has demonstrated a reasonable basis for the per-termination and per-connection application of ACF and COC rate elements. AT&T established per-termination and per-connection charges because the provisioning of multiple terminations and connections generally occasions a corresponding multiplication of expense. Several identifiable work functions are consistently associated with the provision and end-to-end coordination of the individual legs of multipoint circuits, and Dow Jones has not specified the work functions or facility components which it asserts in general terms are unnecessary to provide its supposedly simpler "one-way" multipoint arrangements. Dow Jones also has failed to assert other, specific grounds for the savings it argues are realized by such arrangements. Nor has Dow Jones provided specific grounds on which to question AT&T's statement that COC-related costs do not vary significantly for the different types of voice-grade arrangements.

29. AT&T is not required to establish a punctilious, finely-grained rate structure with a discrete rate element for every identifiable aspect of circuit provisioning, without regard for its separate utility to customers.[25] At some point, simplicity and consistency in the overall rate structure's application must reasonably be accorded comparatively greater importance than the corresponding exclusion of rate elements so specialized in their application as to reflect particular circuit configurations. AT&T's explanation of the ACF and COC rate elements' derivation and application thus satisfies us that the use of per-termination and per-connection charges does not violate AT&T's obligation to devise a rate structure that does not create unreasonable discrimination or undue preferences.

b. Overlap Between ACF and COC Rate Elements

30. *AT & T Response*. AT&T responds to contentions of overlap between the ACF and COC rate elements by contending that its detailed descriptions of the work activities and facilities used to provide these elements, supplied in response to paragraphs 27-28 of the *Designation Order*, establish that work activities associated with the ACF relate only to the installation, testing, and maintenance of access while COC work activities are limited to connection of components in an AT&T central office. AT&T Response at 12.

31. *Comments*. Dow Jones asserts that many activities and associated costs are common to the generic ACF and COC rate elements, and supports this contention with examples taken from AT&T's response. Dow Jones states that these common costs are allocated to the respective rate elements on a quantitative basis rather than a specific relationship with a particular rate element, and complains that the disaggregation of costs on the basis of STRS and allocative ratios derived from USOC counts of rate element demand is "circular" because it allocates more costs to rate elements applied on a per-termination basis. Dow Jones Comments at 6-10. Finally, Dow Jones asserts there is no indication in AT&T's costing methodology that costs associated with specific subactivities are allocated to individual rate elements, so that the theoretical functional distinctions between these elements (and the IOC) are not reflected in AT&T's allocation methods. *Id*.

32. *Discussion*. The commonality of underlying activities evident in AT&T's detailed response to paragraphs 27 and 28 of the *Designation Order* does not impugn the reasonableness of the rate elements established to reflect useful aggregations of these underlying activities; indeed, it is difficult to conceive a rate structure entirely lacking such commonality of underlying functions, when the rate structure is regarded from the perspective of comparatively fine-mesh activities. As to the allocation of common costs on a quantitative basis, we consider this a reasonable approach, given the disproportion between the administrative burdens of pursuing a still more granular methodology and the limited practical benefits of the refinement that might ensue, accepting as we do that the per-termination application of the ACF and the per-connection application of the COC elements are each adequately supported and impose no unreasonable discrimination between users. *See* paragraphs 31-2, *supra*.

33. Dow Jones' characterization of quantitatively based allocators as "circular" reflects its initial premise that the per-termination or per-connection application of these rate elements is unreasonable; when that threshold assumption is rejected, the asserted infirmity of the allocative method

employed by AT&T falls as well. Finally, we are not persuaded by Dow Jones' contention that costs associated with specific subactivities are not demonstrably linked to the conceptual distinctions underlying AT&T's individual rate elements.

34. Even assuming that substantial functional (and cost) overlap between the ACF and COC rate elements were demonstrated, whether generally or with respect to a particular circuit type, the AT&T structure enables the affected customer to mitigate the overlap by independent action. The more complex the rate structure, in contrast, the more difficult such substitutions become to assess and implement. Even so, while the presence of this ordering alternative initially established the self-policing attribute characteristic of a simple and internally consistent rate structure, the circuit provisioning reports supplied by AT&T at Commission request indicate quite limited customer interest in this alternative.[26] Finally, even if we accept Dow Jones' claim that there is a comparative dearth of competitive alternatives for the multipoint segments of AT&T's arrangements, such a situation suggests that potential entrants perceive limited opportunity for profit on such services if priced competitively with AT&T offerings.

c. Application of Design Layout Report Rate Element

35. AT&T describes three groups of randomly-selected voice-grade circuits established in 1985 between common originating and terminating offices. Two of the three groups demonstrated substantial differences in the length of carrier channels actually used to provide circuits (*e. g.*, from 244.6 to 832.4 route miles for the group of circuits in the 101-500 mile band); local channels also varied in length and in the type of facilities utilized. AT&T also reports variations in the design signal levels and expected measured losses between groups. AT&T Response at 33-1/33-4. The technical variation between individual circuits thus established clearly warrants AT&T's application of the DLR rate element on a per-circuit basis. Comments urging that DLR information be generically applied to a group of circuits, and the costs of DLR preparation spread over them, reflect an incomplete understanding of the extent of provisioning idiosyncrasies within the network.

d. Provisioning Synchronization

36. The *Designation Order* described the concern raised by the costs of synchronizing the availability of LEC-provided circuit components when used as part of an end-to-end AT&T service arrangement: incomplete recovery of such costs through the ACF element would favor the AT&T end-to-end configuration over customer-assembled alternatives, and distort rate comparisons between the provisioning alternatives.[27] In addition, customers using switched access could incur charges for a function not provided them, as AT&T does not undertake to synchronize arrangements involving switched access to its private line services.

37. *AT & T Response*. AT&T states that nonrecurring ACF charges were developed to exclude synchronization costs, which are instead included in the local channel rate element, and that this approach maintains the separate character of the different ordering options (provisioning arrangements) for end-to-end circuits available to private line customers. AT&T Response at 15-1/15-3. Thus, customers ordering special access directly from LECs are still able to obtain the ACF element from AT&T as an option if desired; while customers who order local channels from AT&T under Tariff 11 are required to order the ACF as well, they would have no practical reason to order a local channel from AT&T (rather than the LEC) unless obtaining the ACF as well. Finally, AT&T argues that customers for switched access services avoid indirect support of special access functions, as the ACF entails no recovery of synchronization costs.

38. *Comments*. Arinc contends that AT&T has failed to provide specific cost information establishing that synchronization costs are in fact recovered only by the nonrecurring component of AT&T's local channel rate element under Tariff 11, and that AT&T does not distinguish installation coordination under the ACF from synchronization of local channel availability. Arinc Comments at 6-8.

39. *Discussion*. We have directed AT&T to update annually the information used to support Tariff No. 11, including its lead/lag analysis. AT&T Communication, *supra* note 3. This ensures that synchronization costs added by AT&T to charges it incurs from LECs are accessible to review. Review of AT&T's latest explanation, in Transmittal No. 1064 (filed November 17, 1987), indicates that the average lead time for initiating private line service has continued to decline, to six days; the lag time after notice of discontinuance has reached the practical minimum of one day. AT&T states it intends to reduce the lead time to four days.

40. Contrary to Arinc's contentions, this aspect of end-to-end service is, and should be, distinguished by AT&T from the coordination functions it performs even when customers incur synchronization costs by dealing directly with the LECs. For customers to remain free to order circuit components separately from LECs and coordinate their own aggregations of components if they consider AT&T's recognition of lead/lag expense excessive (or for other reasons), the synchronization costs incurred by AT&T should be recognized outside the ACF element. However, separation of such costs from the local channel element would not be comparably useful, as synchronization costs are inherent in the furnishing by AT&T of local channels. Accordingly, we conclude that AT&T's treatment of synchronization costs is reasonable.

3. Notice of Discontinuance Rate Element

41. The *Designation Order* required AT&T to explain why in particular instances it applies a NOD provision to circuits provided by AT&T under Tariff No. 9.[28] AT&T was asked to describe, for different services, the extent to which the determination to apply a NOD reflects (1) the time necessary to turn-up a discontinued arrangement for re-use; (2) the likelihood of re-use; or (3) possible re-use of a discontinued arrangement to provide other services. The *Designation Order* also required AT&T to describe the rate consequences (given the re-use constraints established in response to (1) - (3) above) of mitigating its generally imposed NOD requirement by providing for the offsetting of revenues obtained through re-use of particular facilities.

42. *AT & T Response*. AT&T states that NOD provisions for specific services are based principally on the time required to facilitate re-use of circuit components, which in turn reflects order processing, access billing and service demand characteristics. AT&T Response at 38-1. AT&T states that while NOD requirements range from one to three months, the actual period for reprocessing

(disconnecting and reassigning) a circuit varies from 61 days to eight months – substantially longer than the NOD requirements. *Id.*[29] In addition, as the customer is free to use the circuit during the notice period, AT&T cannot begin preparing the circuit for re-use immediately upon notification. Advance notice from customers principally assists AT&T in its facility planning. *Id.*

43. *Comments.* Ad Hoc contends that AT&T's failure to state the economic engineering basis for its NOD periods, or to analyze these periods in relation to functional work steps, precludes analysis of savings to AT&T as a consequence of advance notice of discontinuance. Ad Hoc Comments at 12-13. Ad Hoc asserts that changes in the notice periods cannot be justified absent a direct relationship between the length of notice periods and the functions related to inventory and reuse of network facilities. *Id.*

44. *Discussion.* The *Designation Order* indicated that NOD provisions should reasonably reflect actual operating experience with individual services and that the cost of individual facilities should not be recovered twice as a consequence of NOD provisions that protect the carrier beyond any reasonable prospect of earnings deficiencies created by fallow facilities. Ad Hoc has provided no persuasive reason to pursue this matter beyond the scope of the issue as initially designated. As the fallow period before facilities can be re-used exceeds the notice requirement in the NOD provisions, the absence of double recovery is established.

4. DDS Rate Elements

45. In contrast to most other private line services, AT&T's DDS entails two distinct variants of the COC and local channel rate elements. In the DDS service context, a local channel is styled as a DLC. AT&T initially explained this distinctive aspect of the DDS rate structure as reflecting the technical requirement that AT&T circuits, in order to provide DDS service, include a LEC hubbing office. Under the terms of divestiture, these hubbing offices retain certain functions essential to achieving DDS service standards, including network timing and derivation of various DDS sub-rate transmission channels. The DDS interface between AT&T and LEC hubbing offices is established at the 1.544 Mbps rate, and only at that rate. As a technical matter, if sub-rate network transmission speeds are to be provided to end users by AT&T, a separate circuit between the AT&T and LEC offices is established and the derivation of sub-rate circuits from the 1.544 Mbps level is implemented at the LEC hubbing office (or at the AT&T office when the network offering involved is not DDS).

46. The *Designation Order* directed AT&T to provide a more complete explanation of the DDS elements because the initial explanation was unclear. AT&T has supplied additional explanation of the DDS rate elements, including specification of the accounts associated with each and several diagrams portraying the functional components associated with the particular rate elements. AT&T Response at 39-1/39-10. Type 1 Digital Local Channels (DLCs)[30] apply, in conjunction with other rate elements, to the connection between a customer premises and an interoffice DDS channel (IOC), and include LEC charges for channel miles and a single customer termination.[31] Type 2 DLCs apply to the connection between two customer premises, or between one such end user premises and AT&T's switched digital service provided at its office. The Type 2 DLC thus includes LEC charges for channel miles and two customer termination elements. The incremental customer termination element reflects the LEC treatment of AT&T offices as customer premises when they are not connected with LEC offices at the 1.544 Mbps carrier level. The Type 2 DLC neither includes distinctive DDS functionalities of the LEC hubbing office, nor is it applied to circuit configurations that use those functions as adjunct rate elements. AT&T Response at 39-2/39-3; Figs. 2 & 3.

47. We are satisfied that AT&T has treated the use of a LEC hubbing office consistently in developing its rate elements. The different DLC elements reflect AT&T's recognition that, in this context, the presence of distinctive DDS functions in the LEC hubbing office significantly alters the application of the LECs' channel termination rate element under the special access tariffs, and entails corresponding adjustments in the structure of AT&T's counterpart components under Tariff No. 11. The principal AT&T counterpart component is the local channel component, which implicates no comparable LEC-provided hubbing or multiplexing functions when employed in the context of other services.

48. AT&T's Type 2 DLC comprises a second LEC-tariffed channel termination rate element, because that element is consistently imposed by the LEC under the circuit configurations classified by AT&T as requiring a Type 2 DLC. Specifically, this includes arrangements under which the LECs treat the AT&T office as a customer premise because the circuit entails a local channel between the LEC office and AT&T; a channel termination element is not applied when these offices are connected at the 1.544 Mbps access multiplexing level. Similarly, when the circuit connects the end user's customer premises and an AT&T Switched Digital Service office, the LEC tariff treats the AT&T office as a customer premises as well, so that a second channel termination element applies. As noted, these variations in application of the LEC channel termination element generally do not arise in other private line services offered by AT&T, because a LEC hubbing office is not involved.

49. As to the variant central office connection elements, AT&T explains that the Type 1 COC essentially resembles the generic rate element applied to other private line services provided through an AT&T central office when a LEC hubbing office is not involved. The Type 1 COC thus applies in the DDS context to circuit configurations that involve either a single AT&T office or multiple AT&T offices whose interconnection requires no intervening use of the LEC hubbing office. In either situation, the single LEC channel termination rate element applied at the AT&T office and included in the Type 1 COC reflects the absence of sub-rate channel derivation; it does not entail the second channel termination rate element that LECs would apply when they characterize the AT&T office as a customer premises.[32] In contrast, because the Type 2 COC involves two AT&T offices – one interfacing at the 1.5 Mbps interface, and the other at a sub-rate interface – the circuit traverses a LEC hubbing office for the sub-rate derivation that is essential to render these two offices' interface levels compatible. Specifically, the Type 2 COC connects a DDS IOC (1.544 Mbps) to a Switched Digital Service (56 kbps) or an office function (56 kbps). AT&T Response at 39-3/39-5; Fig. 4.

50. With respect to the COC variants, therefore, AT&T's Type 2 COC rate element is reasonably constituted to compass incremental LEC-tariffed components not provided as part of the Type 1 COC. Specifically, such components include the digital data access multiplexing function and an incremental Type 1 DLC, and AT&T's ACF for that DLC.[33] AT&T asserts that these additional functions are invariably used together in this context, and o provide them separately rather than as a composite element would needlessly complicate the rate structure while providing no capabilities independently useful to customers. *Id.* at 39-4. Additionally, while the Type 2 COC entails a transmission component connecting two AT&T central offices (or a loop-back to the same office), this functionality traverses an intermediate LEC hub and so cannot be accurately characterized (from the perspective of AT&T's tariff) either as an IOC or as a local channel rate element. *Id.*

51. AT&T's supplemental explanation and justification is undisputed by commenters. We conclude that it satisfies the concerns expressed in the *May 28 Order* and the subsequent specification of issues in the *Designation Order*.

5. Television Rate Elements

52. The *Designation Order* [34] required AT&T: (1) to explain the functional and cost differences between the two types of central office connection applied in the context of television service; (2) to describe the technical or other constraints requiring the development of two COC variants in addition to the station connection (SC) rate element; (3) to specify how the costs of the new central office connection rate elements were recovered in the previous rate structure (Tariff No. 260); (4) to distinguish between the application of the Type 2 COC and the station connection rate elements; (5) to specify the rate elements applied and the underlying functional differences implicated when (i) a COC is used to connect an IOC to SKYNET service at an AT&T premises and (ii) when a COC is used to connect an IOC to a local channel; (6) to explain the effect on projected television service revenue of the usage of full- and part-time services since the recast offerings took effect; and (7) to explain its assignment of terrestrial television expenses under the PLCS and confirm that those procedures conform to Commission directives stated in CC Docket No. 81-351.[35]

a. Functional and Cost Differences Between Type 1 and 2 Central Office Connections

53. AT&T asserts that the two types of COC rate element for television and audio service each serve a distinct termination function. The Type 1 COC recognizes the usual function of terminating a local television channel at an AT&T central office, whether the channel is obtained under Tariff No. 11 as an AT&T "local channel" or directly from the LEC as "other access." The Type 2 COC recognizes the distinct, incremental termination function provided internally to the AT&T facility network when an IOC is connected to a customer controlled switching arrangement at the AT&T office and, according to AT&T, entails nominal labor effort.[36] AT&T Response at 40-3. This minimal labor effort explains the absence of any recurring charge component for the Type 2 COC. *See* Tariff No. 9, Sections 10-11. Applying the Type 2 COC to this circumstance also maintains structural consistency between the television service and other private line offerings. *Id.*

54. This disaggregation of the termination functions formerly provided as part of the station connection element in its pre-divestiture tariff structure, AT&T argues, reflects both the demarcation of functions required by divestiture necessitating a COC rate element for private line services generally, and AT&T's intent, by establishing a less aggregated rate structure for the television service, to provide greater flexibility in ordering station connection arrangements. AT&T Response at 40-2/40-5.[37]

55. The distinct terminating function is provided by AT&T in either the end-to-end provisioning mode or the "other access" configuration, and the customer-controlled reconfiguration of arrangements within the AT&T central office is an incremental, separately useful function that warrants a separate rate element. We find that AT&T has satisfactorily explained the function of these elements.

b. Technical Or Other Constraints Requiring Development Of Two COC Variants, And Retention Of The Station Connection Element.

56. AT&T states that because the COC elements' function is limited to channel termination, neither element overlaps with the station connection element that provides amplification, diplexing and other equipment-based functions in the central office. AT&T Response at 40-2/40-3. While the COC elements, considered alone, reflect the distinctive functions of terminating local access at an AT&T central office (Type 1 COC) and of terminating an interoffice channel on a central office capability (Type 2 COC), AT&T retained the station connection element as a separate element in the television (and audio) context. AT&T explains this structural departure is necessary for the discrete application of connecting and terminating components to the operational characteristics of television (and audio) service. Unlike other private line services, servicing television and audio subscribers entails mixed due dates reflecting their particular, and varying, requirements.[38] Thus, in the television (and audio) service context, AT&T states, the station connection element continues to recover the cost of amplifiers and other central office equipment that, with respect to private line services generally, are recovered by the COC element. To bundle the station connection and termination components that are separately useful, and in fact are used on different time schedules, would require a customer ordering a full-time local channel to obtain a full-time station connection capability as well, regardless of its usage requirements. Such a requirement could potentially preclude the customer's use of a less expensive, alternative arrangement.

57. The Television Parties contend that the COC rate elements are superfluous and recover costs already recovered under other television service rate elements, principally the station connection provided by AT&T under Tariff No. 9. With respect to the Type 1 COC, the Television Parties contend it makes no sense for AT&T physically to connect and disconnect local channels to one side of a terminal block, if the AT&T station connection termination on the block's other side is permanent. They argue that because the costs of Type 1 COC termination are associated with the terminal block (or jack field), those costs should be assigned to the station connection rate element. Television Parties Comments at 27. Noting

AT&T's statement that no new equipment is associated with the COC element, the Television Parties conclude that "introduction of the two types of COCs has added no additional flexibility, merely additional costs." *Id.* at 28.

58. At the outset, the Television Parties' assertion that channel terminations have been artificially separated from the station connection element, when terminations actually depend on varied functions employed at the AT&T central office (including customer controlled arrangements to which the Type 2 COC applies), does not suggest that the rate structure is unreasonable. The Television Parties appear to believe that elimination of the discrete COC rate elements would somehow reduce their charges. Recombining the termination functionality into the station connection element, without more, however, would only warrant an increase in the rate for the latter element and, as AT&T notes, would deprive some customers of less expensive service arrangements. The absence of new functionality or equipment does not categorically establish that a new rate element is unjustified. Here, the service-specific characteristic of television usage, and the corresponding importance attached by AT&T to enabling the flexible and economic reconfiguration of circuits, justifies the use of this rate structure.

59. As AT&T's Exhibit B (AT&T Response at 40-9) depicts the rate element boundaries, the termination function now provided by the Type 1 COC was provided under Tariff No. 260 as part of the local channel rate element. This historical practice reflects AT&T's predivestiture structure, but does not preclude the subsequent treatment of termination functionality as a distinct rate element when altered circumstances warrant. Indeed, in the post-divestiture context, because a customer may elect to obtain special access components directly from the LEC, separately providing and recognizing AT&T's termination function simply recognizes the inherent, distinct functionalities that are provided by newly divested entities, and rated accordingly. The worth of separately recognizing these functions is not reduced by the circumstance that in some configurations, the several rate elements are assembled and then furnished to the end user under a single carrier's tariff. At the same time, this aspect of the structure directly refutes the Television Parties' contention that the Type 1 COC represents the duplicative recovery of costs traditionally recovered under the local channel rate element.

60. Whether the costs of termination arrangements within the AT&T central office are recouped by development and application of a discrete rate element, or by including the termination function and related costs as a component within an existing rate element, is a matter initially left to the carrier's discretion. Even if the ordering flexibility asserted by AT&T as a benefit of this structure is not important to customers, the recasting of rate elements urged by the Television Parties would not reduce overall costs. It would, however, introduce an unnecessary restriction on the flexible combination of rate elements, premised on a demarcation between functions that AT&T, not unreasonably, seeks to recognize in its structure. AT&T is not required to maintain a particular rate structure for television customers despite intervening events of the magnitude of divestiture; nor is it required artificially to adjust the new structure to avoid recognition of discrete functionalities' costs. Clearly, AT&T is entitled to recover its termination costs under whichever provisioning arrangement a customer selects. No less clearly, it is within the carrier's ratemaking discretion -- and, in this instance, more consistent with the private line rate structure guidelines[39] as well -- to unbundle this function, rather than to bundle it with the station connection rate element. We need not consider whether an alternative approach might be preferable; it is enough for present purposes to determine, as we do, that AT&T's chosen method is reasonable.

c. Recovery of COC Rate Element Costs Under Tariff No. 260

61. AT&T states that the costs associated with the Type 1 COC were formerly recovered in the local channel rate element. AT&T further states that the Type 2 COC rate element was established "to provide for rate structure uniformity with the other private line services" and recovers the "nominal labor effort" required to terminate an IOC channel in a customer controlled switching arrangement port, where that capability replaces the nonrecurring switch operation charge that otherwise applies to the connection or disconnection performed at the AT&T central office. Given the satisfactory explanation of the distinctions reflected in the two COC configurations, discussed above at paragraphs 56-60, we consider the Commission's stated intent in the *May 28 Order* [40] to require AT&T to justify recovery of the COC element's costs through the variant elements applied under the television service has been fulfilled.

d. Functional Distinction Between Type 2 COC And SC Elements.

62. AT&T restates the salient differences presented in the description above: the Type 2 COC is limited to the narrow function of terminating an IOC in a customer controlled switching arrangement, while the SC element connects local channels or other access (with their associated Type 1 COCs) to the IOC network. The station connection functionality includes investment in equipment at AT&T central offices (in television operating facilities) that is dedicated to providing terrestrial television and audio services; this equipment includes amplifiers, equalizers, diplexers, signal generators, and other components clearly separate from the disaggregated termination function of the COC (discussed above at paras. 59-60). AT&T Response at 40-6, 40-7. Accordingly, we conclude that AT&T has justified its decision to use these elements.

e. Connection of IOC To Skynet; IOC To Local Channel.

63. The *Designation Order* required AT&T to provide further explanation of the application of the station connection rate element in these configurations.[41] AT&T states that the station connection is invariably associated with a special access channel (and its associated COC), whether access is furnished by AT&T, a LEC, or the customer. Thus, the SC is consistently applied to connect special access to an IOC, a second special access channel, an overseas channel, or Skynet services. While connection of a special access channel to Skynet thus requires a station connection, however, the station connection rate element is not similarly interposed between an IOC component and Skynet service because Skynet simply reflects the customer's specification of satellite transmission for the interexchange (IOC) segment. As such, AT&T asserts, there is no discrete rate element applied at the demarcation between two interexchange transmission modes, because the equipment and work functions entailed by the

access/IOC connection are not involved. AT&T Response at 41-2. In contrast, connecting the IOC to a local channel (including special access obtained outside AT&T Tariff 11) entails a station connection element, as did the pre-divestiture structure. We find this explanation to be sufficient.

f. Effect On AT&T's Projected Television Service Revenues Of Full And Part-Time Services' Demand Experience After Restructure.

64. The *May 28 Order* required AT&T to submit a report on part-time and full-time terrestrial television channel usage under Tariff No. 260 (January - April 1985) and Tariff No. 9 (May - July 1985) and to compare that operating experience with actual 1984 usage and with the 1985 demand projections AT&T used to develop its rates in Transmittal Nos. 285 and 318. That report was submitted August 23, 1985, and recounted an initial excess of actual full-time usage over projections for the first seven months of 1985 and a countervailing shortfall of part-time service usage. A subsequent report explaining the revenue consequences of this experience, updated through November 1985, was submitted January 17, 1986 in response to the *Designation Order* and has since been supplemented to include data for December 1985. This report, set out in the AT&T Response as "Figure A to Response to Paragraph 42" and reprinted below, both demonstrates the uncertainty of such forecasts and establishes, for calendar 1985, the modest difference between AT&T's aggregate revenue projections and actual experience:

Figure A to Response to Paragraph 42

TERRESTRIAL TELEVISION SERVICE

1985 Actual vs. Forecast

	Average Monthly Demand		May- December 1985 Revenues	
	Forecast*	Actual**	Forecast***	Actual
Full-time IOC Channel Miles	8,757	15,873	8.2M	14.2M
Part-Time IOC Channel Mile Hours	1,723,030	992,878	15.2M	8.7M
Full-Time Station Connections	131	297	2.8M	6.2M
Part-Time Station Connection Hours	4,372	2,886	5.1M	3.3M
			31.3M	32.4M

TOTAL REVENUE

Actual32.4M
Forecast31.3M

Difference 1.1M

* As filed in Transmittal No. 318, D&J p. 6 Transmittal No. 285, D&J Fig. 5-8, p. 5-13.

** For the period of May thru December, 1985.

*** These forecasted revenues for the period of May thru December 1985 represent the IOC and station connection components of the gross revenues shown in Transmittal No. 318, Appendix C. p. 2.

65. As the aggregate revenue realized from television service in 1985 deviates less than 4 percent from AT&T's forecast, the carrier's aggregate revenue forecasts appear to have been reasonably accurate. The prospect of increased competitive entry in both satellite and fiber-optic transmission modes suggests demand for AT&T's terrestrial television service will continue to be difficult to predict. Given the apparent reasonableness of the carrier's past forecasts and the difficulty of predicting for a service confronting a rapidly changing competitive environment, we find no cause for further investigation of AT&T's demand estimation practices in light of this record.

g. Justification Of Terrestrial Television Cost Allocation Procedures Under PLCS As Consistent With CC Docket No. 81-351.

66. The *May 28 Order* [42] and the subsequent *Designation Order* [43] required AT&T to explain its assignment of terrestrial television expense under the PLCS, and justify these procedures in terms of the Commission's instructions to AT&T in the *CC Docket No. 81 - 351 Order*. *See* n. 35, *supra*. The comparatively limited instructions in that Order were directed to a more consistent development of depreciation reserve ratios, and the allocation of certain expense accounts on a more realistic basis than revenues.

67. The Commission found in the *CC Docket No. 81 - 351 Order* that AT&T had used inconsistent methods to determine depreciation reserve ratios in private line tariff filings. The Commission directed AT&T to justify its choice of factors, explain why it had not provided alternatives, and explain the impact of using reserve factors more specifically related to television services. As to expense allocations, the Commission determined in *CC Docket No. 81 - 351* that the assignment of expenses to and within the television service was sufficiently explained by AT&T's references to ICAM principles (including the direct assignment of some expenses formerly allocated by different techniques), but criticized AT&T's allocation of three expense accounts on the basis of revenues.[44] AT&T was directed to allocate these accounts (accounting, sales and commercial expense) by "a more realistic scheme . . . these expenses should be allocated on the basis of some measure of usage of the services involved." 88 FCC 2d at 1693-94.

68. Section 99 of AT&T's Tariff Filing Package (TFP) 1525 (revised October 1982)[45] indicates that under PLCS the depreciation reserve expense is apportioned to individual services on the basis of an allocative factor that reflects the individual services' and rate elements' proportional investment within the private line category. This method satisfies the concerns expressed in *CC Docket No. 81 - 351*

respecting AT&T's use of inconsistent cost factors (and derivation methods) in presenting cost support data for particular services or equipment.

69. AT&T claims that PLCS achieves the Commission objective of assigning expenses (as calculated by the Prospective Fully Distributed Cost System) to television service on the basis of "some measure of the relative use of the service." According to AT&T, that system uses service-specific data, such as forecast demand, to determine the television service's share of investment, and sales hours or central office testing measurements to determine directly assignable expenses. AT&T Response, Att. A at 1, 3-4. AT&T asserts that these data and forecast demand are also used in accordance with ICAM principles to determine the allocation of television service expenses not directly assignable, so that decreased demand occasions proportionately diminished expense allocations. *Id.* at 8, para. (c). Within PLCS, AT&T explains, expenses are assigned to the television service under the methodology documented in TFP 1525. This initially entails development of television service investments by account type and the subsequent development of directly assignable expenses using data from time reporting and similar systems, such as the STRS. Other directly attributable expenses are allocated on the basis of television service investment or directly assignable expenses; unattributable expense elements are allocated on the basis of either total attributable expenses, "big four" wages, or total investment (TPIS).

70. The bulk of the Television Parties' comments on AT&T's Response are devoted to contesting AT&T's development of terrestrial television costs. The Television Parties' initial contention is that AT&T's claimed investment in television service facilities is excessive, in part because including unused "start-up" facilities allocated to television service on the basis of 1978 relative use data. That contention attempts to revive claims denied in the ICAM proceeding, CC Docket No. 79-245 -- that the television services were improperly assigned costs of facilities available for future growth (FAFFG) caused by other services.[46] The Commission concluded in *CC Docket No. 81 - 351* that AT&T had followed ICAM procedures, which exclude the FAFFG concept. The Commission declined to reopen that question in this investigation. The *May 28 Order* said that assertions of unwarranted increases in AT&T's investment allocated to television service constitute "an effort to reargue that ICAM determination." 103 FCC 2d at 116.

71. Similarly, in responding to the Television Parties' petition for reconsideration, the Commission noted that investment for television had reasonably been grounded in 1985 demand and investment projections that principally reflected the assignment of non-service-specific plant on a relative use basis. *Restructure Reconsideration, supra,* at 778. That relative use calculation, contrary to the Television Parties' contentions, reflects more recent adjustments, including the effect of demand revisions urged by the Television Parties in response to Transmittal No. 318. *See* n. 51, *infra.*

72. The Television Parties also challenge AT&T's explanation of PLCS. While AT&T's summary explanation in Att. A of its Response is primarily directed to voice grade and APS services that use shared plant, the direct assignment procedure accorded service-specific investments by PLCS is explicitly described in TFP 1525. Review of TFP 1525 indicates that AT&T's initial development of investment for attribution to specific services is not limited to the allocative procedures applied to shared facilities but includes the direct assignment of investments. *See* TFP 1525 Sections 4, 7.04.[47] While the subsequent refinement of investment figures for specific services requires development of allocation ratios, which are then used "to distribute the PFDC-provided total private line category investment amount to the service and rate element level[,]"[48] these allocative ratios are developed by reliance on the initial investments attributed to specific services. This process is presented schematically in Fig. E of AT&T's Response. We do not find any reason to expand the scope of this investigation to include investment allocations among private line services.[49]

73. The Television Parties also challenge AT&T's "relative use" expense allocation procedures. AT&T allocates certain expenses to the television service on the basis of the investment allocated to the television service, whether actually used to provide television service or not. AT&T explains that it directly assigns the expense accounts specifically noted by the Television Parties (Product Management Expense, Account 640; Sales Expense, Account 643; and Local Commercial Operations Expense, Account 645) to services and rate elements, through the use of data from time reporting or other technical support systems. The cost per unit for these service-specific expenses is then calculated by dividing historical expense by the prior year's demand quantities, measured in terms of USOC counts for the service rate element. AT&T Response, Att. A at 5-9. These costs thus reflect annual relative use adjustments by AT&T premised on actual demand and are not tied to 1978 relative use figures, as suggested by the Television Parties.[50]

74. The Television Parties contend, however, that prior to the subject transmittals, AT&T calculated allocation factors for certain directly assignable television service expense accounts by the use of service units, such as channel mile hours (CMH) (for interexchange channels), or station connection hours (SCH) (for station connections) -- units that directly measure the actual facility and/or labor use entailed in providing service. The Television Parties contend the replacement of "actual use" allocators such as CMH by a "relative use" mechanism dependent on STRS and USOC counCC *Docket No. 81 - 351.* Additionally, the Television Parties assert that AT&T has since attributed other expense accounts, not specified for remedial action by *CC Docket No. 81 - 351,* on the basis of investment allocations that reflect relative use methods.

75. We conclude that AT&T has used rational methods to allocate expenses that are consistent with the Commission directive in *CC Docket No. 81 - 351.* The use of time reporting or similar systems to develop historical expense per unit is entirely consistent with the Commission's requirements. The Television Parties' assertion that the reference in *CC Docket No. 81 - 351* to "some measure of usage" precludes a "relative use" approach, is untenable. The relative use of private line services in general is an accepted basis for allocation of overall private line investment and expenses.

76. AT&T has demonstrated that the use of accounts such as Sales Time Reporting Systems or the Service Management Work Assignment Study is in fact more directly related to the cost elements sought to be tracked than is a comparatively aggregate surrogate indicator such as channel mile hours. Using USOC counts for the individual service rate element to determine prior year's

market demand and calculate cost per unit for these individual cost elements appears to represent a more precise method than the CMH-based procedure. In any case, it is a reasonable method that comports with Commission requirements.[51]

77. Finally, the Television Parties contend that AT&T has failed to satisfy the *Designation Order* requirement that it explain and justify its assignment of television expenses, specifically directly assignable expenses such as commercial and marketing expenses. The Television Parties also complain that AT&T does not detail the application of time reporting and similar systems with sufficient particularity to verify the cost calculations developed from the application of these systems. As the Television Parties note, AT&T's earlier practice of allocating these expenses by the use of CMH or SCH references enabled such independent verification. We have here specifically determined that AT&T's use of USOC counts, in conjunction with sales time and related reporting systems, are reasonable methods for allocating expenses.

6. IOC Mileage Band Recasting

78. The *Designation Order* [52] specified in considerable detail the supplemental information AT&T should provide about the underlying costs characteristic of shorter and longer IOC circuit components provided under Tariff No. 9.[53] The *Designation Order* recognized that, far from unfairly burdening users of shorter circuits who were accustomed to lower rates, the recasting implemented by the subject transmittals "may stop well short of fully recognizing the underlying cost differences." *Designation Order* at para. 43. AT&T subsequently filed a transmittal that further modified the relationship between rates for shorter and longer voice grade circuits.[54] That change did not provoke any challenge.

79. Although the record in this proceeding does not demonstrate that distance-based price differentials are precisely correlated with cost differentials, AT&T clearly has not overpriced the short-haul circuits. We have accordingly decided to terminate this investigation of IOC mileage bands.

B. ***Additional Issue -- Application of Rate Adjustment Factor***

80. The *May 28 Order* determined that AT&T's reliance on rate center pricing for local channels offered under Tariff No. 11 needlessly complicated rate comparisons between AT&T's offerings and the underlying special access services provided by local exchange carriers. The Commission therefore required that AT&T revise Tariff No. 11 within six months to establish serving wire center (SWC) pricing, in order to align pricing of AT&T's local channels with the rate structure of the exchange carriers. AT&T responded to this requirement by filing Transmittal No. 504, which became effective January 11, 1986. In addition to recasting the pricing of local channels provided in Tariff No. 11, that transmittal increased rates for services provided under that tariff by an estimated 19 percent or 290 million. AT&T contended that, notwithstanding the SWC pricing regime's more accurate reflection of expenses incurred by AT&T under LEC tariffs, keeping its overall rate levels unchanged raised the prospect of a 1986 revenue deficiency of at least225 million.[55] To avoid this deficiency, AT&T applied a rate adjustment factor of 10.1 percent to increase recurring charges for all local channel services.[56] We directed AT&T to submit a detailed explanation of the information available to it from LECs that resulted in the decision to apply the RAF in that manner.

81. AT&T states in its explanation, submitted December 31, 1986, that there is no reason to believe application of the RAF would vary substantially were it developed on a more service-specific or configuration-specific basis. In part this reflects the variety of incremental LEC charges incurred by AT&T when rate elements other than those representing basic special access capability are necessary in particular instances,[57] and in part the more generic rate averaging by AT&T that necessarily arises from the difficulties of coordinating service with multiple independent access providers. In this latter respect, for example, AT&T states that: the RAF recovers expenses arising from differing LEC billing practices;[58] from the lag between LEC tariff revisions and corresponding AT&T tariff changes; from the "normalizing" of AT&T's rate structure to comport with the majority of LEC special access structures; and from the prosecution of claims for LEC special access overcharges, which AT&T contends routinely exceed100 million. AT&T asserts that there is no reason to anticipate that either the peculiarities of provisioning individual service orders, or the broader constraints of coordinating its rate structure with the billing practices of multiple LECs, would vary significantly by either private line offering or circuit configuration, as the underlying LEC tariffs reflect those distinctions in their rates.

82. In any case, AT&T contends that a more disaggregated approach to the attribution of a RAF is effectively precluded by the expenses of implementation. LEC special access bills to AT&T do not generally provide data from which the costs of an anticipated revenue shortfall can be allocated to specific services or circuit configurations. Rather, these bills are presented under an aggregate Billing Account Number (BAN), which may comprise access components provided in a given LATA or other geographic area.[59] In addition, much of the individual circuit billing detail provided by LECs is furnished on a nonmechanized basis. Even when billing detail is provided on a mechanized basis, it does not indicate the AT&T service for which the special access was used, so that a service specific RAF could not be developed from it. Similarly, LEC special access bills do not necessarily identify whether the referenced channels are used for two-point or multipoint service, and multipoint configurations may generate several access bills from a single LEC. Thus, a single LEC bill for special access used in a multipoint configuration is uncommon. Finally, because AT&T commonly uses high capacity LEC access to provide both higher capacity service and multiplexed, lower-bandwidth arrangements, allocation of costs between these services would require substantial additional administrative effort.

83. AT&T's supplemental explanation satisfactorily identifies both the practical constraints that work against a more disaggregated RAF, and the considerations suggesting that the present approach does not unduly burden particular services or circuit configurations. None of the commenting parties have criticized AT&T's supplemental RAF justification, and in any case, individual customers who believe that AT&T's approach fails to accord adequate weight to their circumstances remain free to obtain local channels directly from the local exchange carrier. We therefore conclude that the RAF methodology used by AT&T is reasonable under the present circumstances.

III. CONCLUSION

84. As noted in the *Designation Order*, the primary purpose of this investigation was to clarify rate structure issues left imprecise or incomplete by AT&T's tariffs and supporting materials, rather than a concern with the more fundamental architecture of its recast rate structure. Indeed, even before clarification of those issues, the improved structure facilitated inquiries that would not have been productive if attempted in the context of AT&T's previous rate structure. The detail evident in the *Designation Order* and in the preceding discussion thus reflects our concern that the rate structure elements central to AT&T's generic private line offerings be thoroughly examined. The Commission's reliance on unbundled rate elements, resale and shared use of services, and comparably unobtrusive regulatory mechanisms to foster competition, in preference to measures that more actively displace the carrier's judgment, requires such transparent rate structures.

85. As described above, the supplemental explanations provided by AT&T have established in requisite detail the structural transparency that was initially apparent when the Commission permitted the recast structure to become effective. The record demonstrates, as well, AT&T's reasoned application of divergent rate elements when the circumstances of particular services would render a more categorical approach problematic. Especially given the substantial complexities inherent in the process of developing such a rate structure, and the complications of reflecting the sometimes disparate practices of exchange carriers, these further inquiries have confirmed our initial judgment that AT&T's recast rate structure represents a substantial advance beyond its pre-divestiture arrangements, and will serve to implement the broad purposes of the private line rate structure guidelines.

IV. ORDERING CLAUSES

86. Accordingly, IT IS ORDERED that the Investigation in CC Docket No. 85-400 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T Communications, Restructuring of Private Line Services, 103 FCC 2d 77 (1985) (*May 28 Order*), *recon. denied*, 104 FCC 2d 773 (1986) (*Restructure Reconsideration*). The Commission had previously rejected AT&T's initial plan for post-divestiture private line tariffs. Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase II (AT&T Communications Private Line Services, Tariff F.C.C. Nos. 3 and 6), FCC 84-292, released Feb. 14, 1985. On January 18, 1985, AT&T filed a new transmittal proposing a substantially different structure for its post-divestiture private line offerings. AT&T modified the proposed tariffs in subsequent transmittals. The modified proposal became effective on April 27, 1985.

[2] AT&T Communications, Tariff F.C.C. Nos. 9, 10 and 11, Order Designating Issues for Investigation, Mimeo No. 1790, released Jan. 7, 1986 (*Designation Order*).

[3] AT&T Communications, Transmittal Nos. 504 and 559, 1 FCC Rcd 1016 (1986).

[4] Comments were submitted by the Ad Hoc Telecommunications Users Committee (Ad Hoc), Aeronautical Radio, Inc. (Arinc), Dow Jones and Company, Inc. (Dow Jones), Television Service User Parties (User Parties), and Western Union Telegraph Company (Western Union). Rather than separately summarize these comments by party, as their focus varies considerably, we have presented commenters' arguments in the discussion of the specific issues they address.

[5] Petitions for reconsideration of the *May 28 Order* asked the Commission to expand this investigation to examine AT&T depreciation expense calculations that were based upon then pending represcription requests. *See* Restructure Reconsideration, 104 FCC 2d at 779-80. The Commission said that any necessary adjustments would be implemented in this investigation. *Id.* at 780, n. 12. AT&T subsequently reported that its private line category earned a 3.42 percent return in 1985 and a 10.81 percent return in 1986. These achieved returns were well below the authorized return. Thus, any overstatement of depreciation expense attributable to the private line category as a practical matter was offset by an underestimate of other costs and/or an overestimate of revenues. Therefore, no refund or adjustment is required.

[6] In Aetna Life Insurance Company, DA 88-462, Apr. 13, 1988, the Bureau considered claims for damages by several parties who contended that AT&T's rates for DDS represented unjust and unreasonable overcharges. To the extent these claims are not precluded by the period of limitation in the Communications Act, 47 U.S.C. § 415(c), they will be considered in further, separate complaint proceedings. These complaints raise issues beyond the scope of the DDS rate structure issues designated for investigation in the instant proceeding, and resolved *infra* at paras. 45-51. Our resolution of those structure issues here is not intended to suggest any view of the merits of the pending complaints.

[7] We have used the term "nonrecoverable costs" to describe labor and material costs of establishing service that are specific, and useful, to a particular arrangement, but which cannot be recovered directly from the customer requesting service -- whether because the order is cancelled or service discontinued before these costs are fully recouped -- must consequently be borne by customers who receive no benefit from them.

[8] AT&T's practical ability to increase Tariff No. 11 rates above the underlying LEC charge is constrained by the customer's ability to order special access directly from the local exchange carrier.

[9] American Telephone and Telegraph Co. (Manual and Procedures for the Allocation of Costs), CC Docket No. 79-245, Report and Order, 84 FCC 2d 384 (1980)(*ICAM Order*), *recon. denied*, 86 FCC 2d 667 (1981), *aff'd sub nom.* MCI Telecommunications Corp. v FCC, 675 F.2d 408 (D.C. Cir. 1982). ICAM procedures were subsequently revised in the same docket to reflect divestiture. 94 FCC 2d 1118 (1983).

[10] Part 31 of the Commission's Rules as then organized, 47 C.F.R. Part 31, prescribed the Uniform System of Accounts for Class A and Class B Telephone Companies.

[11] The guidelines are found at Section 61.40 of the Commission's Rules, 47 C.F.R. § 61.40.

[12] This Order examines the recovery of costs incurred by AT&T to synchronize the availability of multiple circuit components at paras. 36-40, *infra*. The term "coordination" denotes the AT&T activities and equipment necessary to combine components from different sources into a functioning end-to-end circuit. The term "synchronization" has a narrower scope. "Synchronization" describes the simultaneous availability of discrete components. The

private line customer who elects to order local channel circuit components directly from the LEC (as special access), for example, by that decision also undertakes the responsibility to synchronize the availability of LEC-provided and AT&T-provided circuit components that will be used together to establish an end-to-end circuit, and to bear the charges applicable for the discrete components, consistent with governing tariffs, even if the earlier "turn-up" of some components is of no immediate practical use. (Such a customer of course remains free to obtain the various technical functions needed to assure the components' operational conjunction by separately ordering the ACF element from AT&T; under this approach, AT&T assumes coordination responsibilities but synchronization of component availability remains the customer's obligation.)

[13] *See infra* at paras. 28 and 29.

[14] AT&T tariff charges were taken from tariffs current as of December 31, 1987.

[15] The Inter Office Channel rate element has no nonrecurring component associated with the tariffed offering.

[16] Investigation of Interstate Access Tariff Non-Recurring Charges, CC Docket No. 85-166, Phase I, Part 3, 2 FCC Rcd 3498 (1987) (*NRC Order*).

[17] *Designation Order* at para. 31.

[18] "Remotely bridged" in this context describes circuits bridged outside the AT&T central offices. Generally this involves bridging at a LEC central office, but local distribution components may be bridged at a LEC facility other than a central office.

[19] *Designation Order* at para. 32. The incidence of remote bridges was not specifically questioned in the COC context because the potential influence of remote bridging on service costs was expected to accrue to the coordination functions provided under the ACF element.

[20] AT&T states that it is considering applying the ACF element to bridged and interbridge channels as well, "because most of the work functions identified for the ACF also apply to those channels." AT&T Response at 31-32 n.**.

[21] AT&T cites Section 61.40(a)(3) of the Commission's Rules, 47 C.F.R. § 61.40(a)(3), which states that rate elements should reflect pricing convenience for the carrier. It also cites Section 61.40(a)(5), 47 C.F.R. § 61.40(a)(5), which states that rate structures should be simple and easy to understand.

[22] These estimates are contained in Table I, *supra*.

[23] The components connected, and AT&T's application of the COC element, vary in the context of Terrestrial Audio and Television services, discussed separately at paras. 52 ff.

[24] The first sentence of para. 32 in the *Designation Order* should have characterized the COC's application on a per-connection, rather than per-termination, basis, as AT&T notes.

[25] Even if Dow Jones successfully adduced a specific challange, it would not necessarily establish the challenged structure's unreasonableness; some averaging of costs across the varied provisioning circumstances associated with distinct circuit configurations is inevitable in any ratemaking regime other than customer-specific (in tariff parlance, "individual case basis" or ICB) pricing.

[26] As noted above, Dow Jones asserts generally that one-way multipoint circuits entail substantial economies in provisioning, installation, and maintenance, but neither identifies specific activities avoided or mitigated by such arrangements nor any other basis for its statement.

[27] *Designation Order* at paras. 14-17.

[28] *Designation Order* at para. 38. This issue was not designated with respect to Tariff No. 11 because AT&T's terms and conditions respecting notice of discontinuance in that context generally follow the underlying LEC provisions.

[29] For example, discontinuance of coordinated voice grade arrangements entailing LEC access components requires one month's notice to AT&T, although the shortest interval between receipt of notice and reuse by another customer is 61 days (based on AT&T's standard installation interval). AT&T Response at 38-1/38-2.

[30] The Type 1 DLC entails a separate rate element, digital data access multiplexing, reflecting the incremental multiplexing function used to derive sub-rate channels that is furnished by the LEC hub office.

[31] The LEC charges for channel miles and single customer termination reflect that the LEC hub is connected at the 1.544 Mbps level by access multiplexing to an AT&T office. The digital data "access multiplexing" service function reflects the additional access expenses associated with AT&T's use of LEC hubs to multiplex its 1.544 Mbps network signal into the DDS 56 Kbps rate or other sub-rate DDS offerings.

[32] Specifically, the Type 1 COC connects (1) two AT&T office functions; (2) an office function and AT&T's Switched Digital Service; or (3) special access and a variety of elements -- an IOC, an overseas cable digital channel, an office function, or Switched Digital Service. As none of these entail the derivation of sub-rate DDS channels from the standard 1.5 Mbps interface between AT&T and the LECs for DDS service, only a single customer termination is included in the AT&T rate element.

[33] The specific accounts associated with the Type 2 COC, AT&T states, are the same as those associated with the Type 1 COC and the ACF, with the addition of the account used for the Type 1 DLC.

[34] *Designation Order* at paras. 40-42.

[35] AT&T Revisions to Tariff F.C.C. Nos. 258 and 260, and Establishment of Tariff F.C.C. No. 269, (Series 7000 Terrestrial Television Service), 88 FCC 2d 1656 (1982)(*Television Order*) ; 94 FCC 2d 566 (1983); *proceeding terminated*, Mimeo No. 1610, released Dec. 30, 1983.

[36] The customer controlled switching arrangement enables television service customers to replace the nonrecurring switch operation charge, that otherwise would apply when AT&T central office personnel connect or disconnect local channels or IOCs, with a switching capability controlled from the customer's premise. This optional switching arrangement is independent of the station connection rate element.

[37] The disaggregation of the COC elements and their relation to the station connection element is considered *infra* at paras. 56 ff.

[38] While the configuration of private line arrangements in general is comparatively stable once established, AT&T states, television customers may connect a full-time local channel (and an attendant full-time COC) to another local channel or an IOC, of the same or different customers, via either a full-time or part-time station connection, as the SC element is not tied to a particular local channel.

Because station connections as well as local channels (the latter with attendant COCs) are available on either a part-time or a full-time basis, and significant rate consequences may flow from the subscriber's decision to elect a particular type of circuit component, combining the termination and station connection functions as the Television Parties urge would diminish the range of choice otherwise available to a television service customer. As constituted, the AT&T rate structure for television service departs from the generic arrangements applied to other private line services in that it does not dedicate a full-time station connection to

a particular local channel. Recombining the Type 1 COC termination function with the station connection, as the Television Parties urge, would effectively require that a television service customer ordering a full-time local channel also obtain a full-time station connection, even when its usage requirements make that choice comparatively uneconomic. No corresponding issue arises to affect the rate structure for non-television (and audio) private line offerings, AT&T notes, because subscribers to those services do not generally need the frequent circuit connections and disconnects that occasion the less aggregated rate structure fashioned for the television users.

[39] 47 C.F.R. §61.40.

[40] 103 FCC 2d at 119.

[41] The *Designation Order* implies, in para. 41, that a COC element is interposed between the IOC, on the one hand, and SKYNET service or local access, on the other. In fact, as the accompanying text explains, the COC is involved in such arrangements only to the extent that local access is part of the configuration.

[42] 103 FCC 2d at 116-17.

[43] *Designation Order* at para. 24.

[44] "This methodology provides the somewhat ludicrous result that when rates increase and quantities demanded decrease, as is the case usually, there will be an increase in total expense related to those reduced quantities." 88 FCC 2d at 1693.

[45] TFP 1525 was further revised in November 1986.

[46] *Television Order*, *supra* n. 35, 88 FCC 2d at 1694-95.

[47] AT&T's summary of TFP 1525 states (Att. A at 4) "Initial investment dollars . . . *for each non voice grade private line service* are prepared . . . on the basis of unit investment and *market demand quantities appropriate to their service* " and (Att. A at 8) "cost per unit (service expense per demand unit) is then multiplied by *forecasted* service rate element quantities to determine *prospective* expense . . . " and "directly assignable expense may be allocated . . . on the basis of *prospective* demand quantities alone." Emphasis supplied.

Directly assigned dedicated investments compose roughly 10 percent of AT&T's plant facilities investment, while the 90 percent of plant facilities investment devoted to multi-service facilities is allocated among private line services' rate elements on the basis of relative use.

[48] AT&T Response, Att. A at 4.

[49] The Television Parties' insistent contentions that only dedicated facilities should be attributed to the rate base for television service have consistently been denied. *See* , *Television Order*, *supra* n. 35, at 1683 n.21:

The Networks suggest that AT&T could provide operational and cost data to precisely identify all the facilities used to provide commercial television service, [and] the actual costs associated with particular facilities . . . [a]ny formal hearing to consider such a study, with opportunity for presenting and challenging oral testimony by all interested parties, would necessarily be lengthy and extremely expensive, and might well be obsolete by the time it were finished.

[50] Note 47, *supra*, explains the derivation of prospective expense.

[51] The Television Parties also assert that a "relative use" methodology was applied by AT&T in Transmittal 318, to develop substantially increased investment or expenses that moderated the effect increased demand projections otherwise would have had on the rate of return for television service.

While this consequence would be a source of concern were AT&T's rates developed from fixed-cost accounts for individual services, as the networks urge, the result simply confirms the operation of PLCS as described by AT&T: the per-unit allocative basis of PLCS, reflecting higher demand projections for television service, necessarily allocates correspondingly greater investment and expense amounts to this service. This result implies, of course, that aggregate demand for private line services is not altered, and such were the circumstances of the revisions in Transmittal No. 318.

[52] *Designation Order* at paras. 43-4.

[53] In designating the recasting of AT&T's mileage bands as an issue for investigation, the Bureau sought to "clarify the underlying functional distinctions that are expressed in the rate structure as different pricing approaches" as well as other factors determining the pricing of mileage-sensitive rate elements for particular services. *Id.* at para. 43. Specifically, AT&T was instructed to explain: (1) the factors underlying the recurring cost per mile of providing different services under Tariff No. 9, including the varied breakpoints applied to mileage bands (by service); (2) the differences in utilization of transmission technologies for services provided under Tariff No. 9 and those used for Tariff No. 3; and (3) the factors determining the offering of services on distinct terms (*i. e.*, on a fixed price per mile, by mileage bands, or on a distance-insensitive basis). The Bureau also requested a comparison of mileage bands and corresponding cost factors applied by Tariff No. 9 to the rate structures applied by several private line services with distinct rate structures. In addition, AT&T was requested to compare mileage bands and rates for selected services under Tariff No. 9, those proposed in Tariff No. 3, and the precursor rates under Tariff No. 260, and to prepare hypothetical mileage bands and rates that would eliminate the return disparities between short and long-haul IOC components described in AT&T's transmittals. Id. at paras. 44-45.

[54] AT&T Transmittal No. 1059, filed Nov. 12, 1987.

[55] The private line category's actual earnings for 1986 were 10.81 percent, so with hindsight AT&T's concern is vindicated. 1986 Annual Fully Distributed Costs (FDC) Report, Vol. 2 of Tariff Filing Reference Package (TFRP).

[56] This RAF was projected to generate158 million in additional revenue. A separate, incremental surcharge of 30 percent was applied to local channels provided in independent telephone company service areas, reflecting generally higher special access charges in those areas. AT&T estimated that the latter surcharge would generate67 million.

[57] Examples of such incremental charges are those incurred for specialized local channel arrangements, changes in AT&T's original special access Order, and extensions of special access service on a customer's premises.

[58] Special access provided by more than one LEC, for example, may be billed to AT&T entirely at the rates of the carrier receiving the order from AT&T or at a combination of the LEC rates involved (meet-point billing). Further, to enable use of existing AT&T billing systems, AT&T tariff rates are based on the rates of the predominant Bell Operating Company (BOC) in each state and the predominant Independent company in each LATA. Consequently, in some 2 percent of cases, the Tariff No. 11 charges applied are based on those of a different LEC than the company actually providing service.

[59] AT&T states that there are over 3,400 BANs in the Regional Bell Operating Companies alone, some of which may contain bills for as many as 30,000 circuits.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEPROMPTER
CORPORATION,
Complainant,

v. File No. PA-79-0052

TEXAS POWER &
LIGHT CO.,
Respondent.

TEXAS POWER &
LIGHT CO.,
Complainant,

v. File No. PA-85-0019

GROUP W CABLE, INC.,
Respondent.

ORDER

Adopted: July 19, 1988; Released: July 28, 1988

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 20, 1983, Texas Power & Light Company (TP&L) filed a complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking, *inter alia*, determination of the maximum lawful rate for attachments to its utility poles by Group W. Cable, Inc. Except for determination of such rate, all other issues raised by the complaint were subsequently dismissed.[1] The matter was deferred pending issuance of amended rules for processing pole attachment rate complaints.[2]

2. Meanwhile, on March 17, 1986, the United States Court of Appeals for the Fifth Circuit vacated and remanded the Commission's decision (File No. PA-79-0052) in *Teleprompter Corp. v. Texas Power & Light Co.*, FCC 84-617 (released Dec. 13, 1984), for further proceedings consistent with its decision. *Texas Power and Light Co. v. FCC*, 784 F.2d 1265 (5th Cir. 1986).

3. On July 14, 1988, All Remaining Partners and Paragon Cable, successors in interest to Teleprompter Corporation and Group W Cable, Inc., and Texas Utilities Electric Company, successor in interest to TP&L, filed a joint request for dismissal of the pending complaints and termination of the proceedings, advising that there no longer were issues in controversy.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated in section 0.291 of the rules, 47 C.F.R. § 0.291, that the complaints filed in the referenced proceedings ARE DISMISSED and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Memorandum Opinion and Order, Mimeo No. 3567 (released Apr. 3, 1985).

[2] Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 2 FCC Rcd 4387 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

F.B.C. INCORPORATED File No. BMPCT-870924KF
File No. BMPCT-871102KF

For an Extension of Time
to Construct

and

For Modification of Facilities of
Station WLKT(TV), Lexington, Kentucky

MEMORANDUM OPINION AND ORDER

Adopted: July 20, 1988; Released: July 28, 1988

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration: (a) the above-captioned application of F.B.C. Incorporated (FBC) for an extension of time within which to construct Station WLKT(TV), Channel 62, Lexington, Kentucky; (b) an informal objection to that application, filed by WDKY License Co., Inc. (WDKY), licensee of Station WDKY-TV, Danville, Kentucky;[1] (c) the above-captioned application of FBC for modification of facilities;[2] and (d) related pleadings.

2. The Commission's records show that FBC's construction permit was issued September 24, 1985, and that, after grant of an automatic six-month extension, it had until September 24, 1987, in which to complete construction. On that date, the permittee filed the above-captioned application for additional time to construct. In support of its application, FBC argued that its antenna had been ordered and that both its tower and transmitter were being shipped. The permittee also asserted that600,000 of studio and control equipment was currently being installed. FBC added that it was remodeling leased studio space and expected to move in by October 1, 1987. It further noted that it had already made program arrangements and had hired some of its staff. Nevertheless, it stated that construction was not completed due to the fact that it was unable to obtain zoning approval for its authorized site. It maintained, however, that it had entered a lease agreement for a new site for which zoning approval had been obtained. It added that it would be filing a modification application by early October and would be operational within three months thereafter. WDKY's informal objection followed on October 13, 1987.

3. In support of its informal objection, WDKY argued that the permittee waited until the day its construction permit was to expire before it filed its extension request, despite the fact that Section 73.3534(a) requires such applications to be filed 30 days prior to expiration. WDKY also contended that FBC's extension application misrepresented the extent to which construction of the station had progressed. First, WDKY challenged the permittee's assertion that it had acquired600,000 of studio and control equipment that was then being installed, with October 1, 1987, slated as the date the permittee expected to move in. To the contrary, WDKY asserted that, on October 4, 1987, the studio was still being constructed and was unoccupied without any studio equipment in evidence. WDKY further argued that, on October 25, 1985, FBC was denied a conditional use permit for its authorized site but still has not filed a lease agreement or modification application for the new site. Moreover, the objector asserted that FBC still did not have approval from the Federal Aviation Administration (FAA) for its tower height and location, nor had it requested approval of the site from the Kentucky Airport Zoning Commission (KAZC). WDKY also questioned the permittee's ability to be on the air so quickly if the tower would not be delivered for 12 weeks. Finally, WDKY argued that FBC failed to document the purchase of any of its equipment or its programming and employment agreements.

4. In opposition, FBC maintained that its extension application was timely filed, since it did not have the necessary facts to file an application earlier. Specifically, FBC stated that, without the lease for its new transmitter site, which it was unable to execute until August 24, 1987, filing the application would have been a "useless exercise". FBC further contended that, although it was mistaken in several instances, there was no merit to WDKY's allegation that FBC misrepresented facts to the Commission. In that regard, FBC's President Robert Rosenstein stated that he believed the studio and control equipment was being installed and that the studio could be occupied by October 1. He further stated that unexpected delays postponed the installation and occupancy and that both were expected to take place "very shortly". FBC also clarified its earlier statement that it would take 12 weeks to deliver the tower. That period was also meant to include the erection of the tower. Moreover, FBC denied WDKY's claim that it did little to find a new site after denial of a conditional use permit for its authorized site. During that period, it argued, it actively sought a new site, executed a lease for it, and acquired FAA approval. The permittee stated, however, that the FAA erred in approving only a 460-foot tower, when approval had been sought for a 974-foot structure.[3] Finally, FBC argued that the submission of program agreements and employment contracts are irrelevant to the issues raised here and can only be construed as an attempt by a prospective competitor to seek proprietary information.

5. In reply, WDKY argued that, for the most part, FBC still had not provided the necessary documentation in support of its application and still had not shown why it took nearly two years to locate another transmitter site. It further noted that the permittee had not addressed the allegation that it failed to seek approval for its new site from the KAZC. Moreover, because of the applicant's admission that some of the facts first reported were in error, WDKY urged the Commission to examine closely all of FBC's assertions. WDKY further argued that it was not attempting to gain a competitive edge by calling for the submission of program agreements and employment contracts, and is willing to forgo examination of the material so long as the Commission has a full record in making its decision. Finally, WDKY contended that the permittee's argument with respect to the timeliness of its

application was disingenuous. It maintained that, faced with the prospect of not having reasonable assurance of a site, FBC rushed to execute an eleventh-hour lease. The rule, it argued, is not intended to be a grace period for permittees that have not diligently pursued construction but, rather, is to accommodate permittees that have been frustrated by unexpected changed circumstances.

6. On November 2, 1987, FBC filed its modification application, and on December 9 and 11, 1987, it supplemented its showing to demonstrate further steps it had taken to construct the station. Specifically, it submitted bills of sale totalling more than580,000 for studio and transmitting equipment. It also provided photographs of its completed transmitter building and studio, indicating that equipment was on hand at both sites. The permittee further demonstrated that it had applied for and had received zoning and building permits for its transmitter building. Additionally, FBC submitted the tower site owner's letter of intent to lease the site, dated May 18, 1987, as well as an unexecuted lease. Also furnished was a contract evidencing purchase of a tower.

7. In opposition to the modification application, WDKY argued that FBC failed to file its modification application within 12 months of the issuance of its construction permit, as required by Section 73.3535(a). Consequently, it maintained that the permittee must first demonstrate that grant of its extension application is warranted, but WDKY contended that FBC fell short of that requirement. With respect to the permittee's supplementary showing for that application, WDKY asserted that FBC had still not shown why it took virtually no steps toward construction of the station until one month before its construction permit was due to expire. More specifically, it stated that FBC waited until September 1, 1987, to contract for the construction of the transmitter building and until August 1987 to prepare for the remodeling of the studio building. WDKY further contended that FBC had not satisfactorily explained either the two-year delay in locating a new transmitter site or the additional six-month delay in filing its modification application. WDKY also reiterated its claim that FBC had failed to seek approval of its new site from the KAZC, despite stating that all necessary zoning authorizations have been obtained. Additionally, WDKY maintained that the permittee had engaged in "unlawful premature construction at its unauthorized transmitter site.

8. WDKY further argued that FBC had not sufficiently documented the purchase of studio and transmission equipment. In that respect, WDKY stated that the permittee had submitted three invoices, dated August and September 1987, from companies related to FBC and that FBC's purchase, therefore, appeared to represent a mere reshuffling of equipment within the same corporate structure. WDKY added that a fourth document, dated October 2, 1987, was a mere proposal for studio carpeting from a local carpet dealer. That proposal, WDKY contended, was further proof that FBC misrepresented the completion of its studio by October 1, 1987. Moreover, WDKY argued that there was no evidence that the equipment and carpeting had been received and installed or that the amounts in the invoices had been paid. WDKY further argued that there had been no explanation as to why FBC's August 4, 1987, contract for the design and fabrication of a tower was necessary, since it had already represented that it had "ordered a broadcast tower which was purchased used for280,000, disassembled and shipped to the permittee." In any event, WDKY maintained that FBC failed to provide a payment schedule in its August 4 contract and also contended that there had been no showing of actual payment.

9. After reviewing the pleadings, we found that several questions remained unresolved, and, on January 28, 1988, we requested FBC's responses to them. Specifically, we asked FBC to explain: (1) what steps it took between October 1985 and May 1987 to locate a new transmitter site; (2) why a modification application was not filed until after the construction permit had expired; (3) whether the KAZC had been approached for approval of the site; (4) the circumstances surrounding the purchase of two towers; and (5) the basis for Rosenstein's statements that the studio would be completed and the studio and control equipment installed by October 1, 1987, and the nature of the delays encountered. FBC was also requested to submit copies of cancelled checks or any other evidence to demonstrate the purchase of the equipment and was also asked to furnish a timetable for the completion of construction.

10. In response to our inquiry, FBC set out the various steps it took to acquire a new transmitter site. In all, six different sites were investigated and later abandoned due to local public opposition, the denial of zoning, or technical reasons. It was not until June 1987 that it received final zoning approval for its proposed site. The applicant stated that it could have filed a modification application at that point but alleged that it was informally advised by the Commission's staff to await FAA approval. FBC asserted that, in July 1987, the FAA notified it that the tower would be approved to the 460-foot level but not to 1000 feet, as requested. FBC appealed that decision, and in mid-October 1987, the FAA reversed its previous determination and approved the 1000-foot tower. A few days later, however, the FAA notified FBC that a misplaced timely filed objection to the 1000-foot tower had been discovered. At that point FBC decided to prepare its modification application proposing a 460-foot tower, and that proposal was filed on November 2, 1987.

11. FBC further stated that the approval of the KAZC is more akin to FAA approval than to local zoning approval. For that reason, the applicant maintained the correctness of its earlier statement that all necessary zoning authorizations had been obtained, despite the fact that its proposal was not filed with that agency until August 1987. With respect to its tower orders, FBC asserted that it originally intended to utilize a used tower and contracted for the purchase of such in June 1987. Thereafter, a question arose as to the possibility that the used tower might not accommodate the permittee's needs, so FBC explained that it also ordered a new tower in August 1987 to guard against that possibility. In October 1987, after the filing of its extension application, FBC stated that the used tower was determined to be unsuitable for FBC's purposes. Further, FBC reiterated that Rosenstein was under the misconception that the studio would be completed by October 1, 1987, and that this belief was based upon the representations of the contractor. FBC stated that unforeseen construction delays postponed completion beyond the date initially promised. FBC also furnished a list of checks and wire transfers to document the purchase of equipment and a proposed schedule for the completion of construction. FBC also outlined, for the first time, circumstances surrounding FBC's agreement with. Family Group Broadcasting Operating, L.P. (Family) for purchase of the station.[4]

12. In opposition, WDKY argued that the permittee was still misleading the Commission with respect to the KAZC's approval of the transmitter site by stating that it sought such approval in August 1987. WDKY maintained, however, that the KAZC's records indicate that approval was not sought until February 5, 1988. WDKY further contended that FBC transferred control of the permittee to Family without first seeking Commission approval and violated Commission Rules by failing to file the agreements with the Commission within the time required. WDKY also asserts that FBC failed to submit copies of cancelled checks, as requested by the staff, as evidence of the purchase of the equipment. Rather, it maintained that a partial list of checks was submitted. That list, it argued, showed a payment of rent only for FBC's original site, and it contended that there was no evidence that any other site was acquired. WDKY further asserted that FBC was engaging in premature construction of the station. Finally, WDKY argued that that FBC's decision to await FAA approval of a taller tower before filing its modification application was a business decision of the permittee that did not justify a delay in construction.

13. On May 11, 1988, the staff advised the parties that it needed further information to resolve two issues that had been raised by WDKY: (1) the date on which the permittee sought approval of its site from the KAZC and (2) a description of FBC's actions with respect to the alleged transfer of control of the permittee to Family. On May 17, 1988, FBC submitted the declaration of its consulting engineer, Lyle Evans, who states that, on August 17 and 18, 1987, he prepared FBC's application for submission to the KAZC and that, the following day, he placed the application in the outgoing mail bin. In December 1987 he called KAZC to determine whether the application had been received but was informed that there was no record of its receipt, although he was advised that it might have been misfiled. When the application was still not found several weeks later, Evans indicates that he resubmitted it on February 5, 1988, and that it was granted on March 10, 1988. With respect to the transfer of control question, FBC states that, on August 5, 1987, it entered an agreement with Family for the sale of 49 percent of the permittee's stock. Included in the agreement was the "Shareholders Agreement" described in footnote 4 above. The parties subsequently rescinded that Agreement on October 16, 1987, and FBC now states that Family never exercised its rights under it. FBC further contends that the Agreement did not alter FBC's control over station operations and policies. In opposition, WDKY argues that, as early as October 1987, FBC knew that the KAZC did not have its application but failed to take any steps to cure this problem for four months. WDKY further asserts that FBC has continued to mislead the Commission by stating, on September 24, 1987, that "all necessary zoning approvals" had been obtained and by asserting, on February 12, 1988, that FBC had applied for KAZC approval in August 1987. With respect to the alleged unauthorized transfer of control, WDKY states that it is irrelevant that FBC never amended its Articles of Incorporation or By-Laws or that Family never exercised its right to name three of the five corporate directors. WDKY maintains that the mere fact that Family was given the right to assume control amounted to a *de jure* transfer of control. In any event, WDKY contends that Family has *de facto* control of the permittee, since Family has the right to acquire the remaining 51 percent once the station has operated for a year and since Family has paid for much of the station's construction.

DISCUSSION

14. Section 73.3534 of the Commission's Rules, in pertinent part, provides that applications for extensions of time to construct should be filed at least 30 days prior to the expiration date of the construction permit. The same rule, however, also allows the filing of a construction permit to replace an expired permit up to 30 days after the specified expiration date. Given this latitude, which is built into the rule, adherence to the 30-days-in-advance provision is not strictly observed. For that reason, the rule will be waived and FBC's extension application will be considered on the merits.

15. Before an extension application can be granted, Section 73.3534(b) of the Rules requires a showing that either substantial progress has been made in the construction of the station or that reasons clearly beyond the permittee's control prevented construction and that all possible steps have, nevertheless, been taken to resolve the problem and proceed with construction. Although FBC initially misstated the extent to which its station had been built and although copies of cancelled checks have not been submitted, it now appears that the equipment was ordered prior to the expiration of the permit, as represented, and that the station is substantially constructed. From photographs that have been submitted, it appears that FBC's transmitter and studio buildings are completed and are substantially furnished with the necessary furnishings and equipment.[5] As a result, WDKY's contention that the equipment acquisitions only represented paper transactions with sister stations is not persuasive. FBC has also adequately explained the purchase of both used and new towers for use by WLKT(TV). Consequently, it appears that FBC has made substantial progress in the construction of the station. FBC has also shown that circumstances beyond its control, namely, the unavailability of its authorized transmitter site, prevented timely construction of the station and that it made several attempts to locate a new site. In that connection, it is not necessary, as WDKY suggests, that a permittee actually purchase or lease alternate sites for those efforts to be considered *bona fide* attempts to resolve the lack of a site. Further, it appears that FBC has now found a site for which it has secured both FAA and KAZC approval. Additionally, while we would expect a permittee to file its modification application as soon as it finds a new site, the uncertainty of FAA approval of FBC's proposed tower height was a rational basis for the permittee's belief that it should delay filing the application.

16. Further, we are unable to find that WDKY has established that FBC has made misrepresentations in connection with its extension of time application. A necessary element in misrepresentation is wilfulness. *Bluegrass Broadcasting Co.*, 43 F.C.C. 2d 990, 993 (1973). Carelessness, exaggeration or slipshoddiness, which lack that necessary element, do not constitute misrepresentation. *John C. Roach*, 43 F.C.C. 2d 685, 689 (Rev. Bd. 1973). For the reasons that follow, we find that the statements submitted by FBC and questioned by WDKY fall on the side of carelessness and do not constitute misrepresentations. While construction of the WLKT(TV) studio was not completed by October 1st, as initially represented, Rosenstein

asserts in a sworn statement that his original studio availability projection was premised on the scheduled completion date set forth in the construction contract for that facility. We find that explanation, supported by a copy of the contract submitted by FBC, to be reasonable. Similarly, we find plausible Rosenstein's explanation, noted above, of his earlier statements concerning FBC's acquisition of all necessary zoning authorizations for its transmitting facilities. With respect to the installation of studio equipment, Rosenstein was admittedly mistaken in stating in the extension application that the studio and control equipment were "currently being installed." According to Rosenstein, he believed that that equipment had been removed from another television station and was being installed in the WLKT(TV) studio, which was then under construction. As explained above, however, occupancy of the studio by October 1st was forestalled by construction delays. We note in this regard that, following completion of studio construction, installation of the necessary studio and control equipment proceeded promptly. By early December 1987, the WLKT(TV) studio facilities were fully operational. Having already indicated to the Commission that the studio building which would house the subject equipment would not be ready until October 1st, Rosenstein would have had little to gain by convincing the Commission that studio equipment was being installed prior to that date. Given these facts, it seems unlikely that Rosenstein would have sought in his statement of September 22, 1987, to mislead the Commission deliberately concerning the actual installation of studio equipment. We therefore consider Rosenstein's statement that studio equipment was "currently being installed" not as an attempt falsely to convince us of the literal truth of the assertion, but as an admittedly imprecise, careless assertion that reflected Rosenstein's mistaken belief that both the installation of the studio equipment and completion of the studio building were imminent. Under these circumstances, we can accept Rosenstein's sworn declaration that that he "never made any deliberate false statements in FBC's application . . . [and] never intentionally sought to conceal any information from the Commission.

17. Similarly, we find plausible FBC's explanation as to the filing date of its application with the KAZC. Evans states that he prepared the application on August 17 and 18, 1987, and the application itself confirms this fact. He further contends that he placed the application in his outgoing mail bin the following day but that the KAZC had no record of receiving it – possibly because it might have been misfiled. After two inquiries at the KAZC, Evans resubmitted the application in February 1988, and it was granted shortly thereafter. Given Evans' assertions, it appears that FBC's representation on February 12, 1988, that its KAZC application had been filed the previous August was based on a reasonable assumption as to the facts. Nonetheless, FBC's failure to note in its February 12th statement that it then knew the August application had not been received by the KAZC and that FBC had resubmitted its application to the KAZC on February 5, 1988, reflects a level of carelessness in pleading that we seek to discourage. Accordingly, we admonish FBC for failing to explain circumstances fully as they occur. The Commission places great reliance on the representations of applicants, and we cannot tolerate their failure to be completely candid. In the future, therefore, we expect FBC to exercise greater care in reporting facts to the Commission. We cannot, however, conclude, as WDKY suggests, that the omissions in FBC's February 12th statement constitute misrepresentation under the criteria noted above.

18. Finally, although FBC's agreement with Family might have envisioned the transfer of control of the permittee, the Shareholders Agreement establishing this transfer was terminated before the Articles of Incorporation or By-Laws could be amended and before Family could elect any directors. Moreover, FBC states that the shareholders did not vote on any matters while the 2/3-majority-rule agreement was in effect. Although we conclude that there was a *de jure)* transfer of control of the permittee to Family, the transfer was temporary, corrected before Commission intervention, and no actions were taken that were inconsistent with FBC's control during the brief period in question. In these circumstances, we find that the actions of FBC and Family do not raise questions as to their basic qualifications. Further, we are unable to find a *de facto* transfer of control. It is permissible for a minority stockholder to participate in the day-to-day operation of a permittee or licensee. WDKY has not alleged any+ actions on Family's part to indicate participation beyond that properly exercisable by a minority shareholder. Finally, although FBC should have submitted copies of its agreements with Family within 30 days of the date they were entered, pursuant to Section 73.3613 of the Commission's Rules, its failure to do so here is not the type of violation that would constitute a basis for revocation of the construction permit or otherwise reflect adversely on FBC's basic qualifications to be a Commission licensee.

19. For the reasons stated above, we find that grant of FBC's extension application is warranted and that grant of its modification application would serve the public interest. The permittee is cautioned, however, that construction is expected to be completed within the time provided herein. Accordingly, WDKY's informal objection IS DENIED, Section 73.3534(a) of the Commission's Rules IS WAIVED, FBC's extension and modification applications ARE GRANTED, and FBC's construction permit is extended until six months from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

FOOTNOTES

[1] Danville is located 36 miles south of Lexington, and the stations would serve substantial areas in common.

[2] Specifically, the modification application proposes the relocation of the station's transmitter site, an increase in the visual effective radiated power, and a decrease in the height of the antenna above average terrain and above ground level.

[3] Although FBC requested FAA approval of a 974-foot tower, the FAA was able to approve a structure at that site of only 460 feet.

[4] Specifically, on August 5, 1987, FBC and Family entered an agreement whereby the latter would immediatedly purchase 49 percent of the stock of the permittee. The remaining 51 percent is now owned equally by the eight existing shareholders of FBC. In

addition, Family acquired an option to purchase that 51 percent interest one year after the station commences operation. The contract also included a Shareholders Agreement which looked to amending either the Articles of Incorporation or By-Laws to require a 2/3 vote on any matter brought before the shareholders. The Shareholders Agreement also provided that Family be afforded the right to elect three of the five directors of the permittee.

[5] WDKY contends that the construction and furnishing of the transmitter building constitutes premature construction at an unauthorized site. Construction of a building that may be used for a number of purposes, even where one of those purposes may be to house a transmitter, has been found not to constitute premature construction, within the meaning of Section 319(c) of the Communications Act. *See WSAV, Inc.*, 10 R.R. 402 (1955), *aff'd* sub nom. WJIV, Inc. v. FCC, 231 F.2d 725 (D.C. Cir. 1956); WAVV Communications, Inc., 48 F.C.C. 2d 1113 (1974).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-135

In the Matter of

Height and Power Increases in the
Public Land Mobile Radio Service

ORDER

Adopted: July 7, 1988; Released: July 11, 1988

By the Chief, Mobile Services Division:

1. On July 6, 1988, the National Association of Business and Educational Radio, Inc. (NABER) filed a "Motion for Extension of Time" in the captioned proceeding. NABER requests a sixty-day extension up to and including September 5, 1988, in which to file reply comments. On July 7, 1988, CUE Paging Corporation (CUE), in support of NABER's motion, also filed a request for a sixty-day extension until September 5, 1988. Telocator Network of America (Telocator), on July 7, 1988, filed an opposition to NABER's motion. The deadline for replies in this proceeding is July 8, 1988.

2. In support of its request, NABER argues that an extension of the reply comment deadline will enable it to prepare a full and complete response to the comments filed by Telocator. Specifically, NABER states that Telocator's comments include detailed technical information that requires extensive consideration and analysis. Similarly, CUE argues that Telocator's comments include a detailed technical proposal requiring careful analysis, and an extension will enable it to submit a thorough technical analysis in its reply comments.

3. In its opposition, Telocator argues that NABER's motion should be denied because it is both untimely and unjustified. First, Telocator states that NABER's request was filed only two days prior to the July 8 reply comment deadline, and thus does not comply with the Commission Rules, which require motions for extensions of time to be filed at least seven days before the filing deadline. According to Telocator, NABER does not give an excuse for its failure to conform with the seven-day requirement. Moreover, Telocator argues that NABER has not provided a credible showing to justify a sixty-day extension, and that the long extension requested indicates NABER's desire to delay the resolution of this proceeding.

4. NABER and CUE have failed to demonstrate good cause to warrant a grant of a sixty-day extension of time in which to file replies. Furthermore, we agree with Telocator that NABER's motion was untimely filed, and that no reason for this non-compliance was given. *See* Section 1.46(b) of the Commission's Rules. However, in the interest of encouraging a complete record in this proceeding, we will grant an extension until July 25, 1988.

5. Accordingly, NABER's and CUE's requests for an extension to file replies in the captioned proceeding are GRANTED to the extent indicated herein, and Telocator's opposition is DENIED to the extent indicated herein. Effective on the release of this *Order*, the reply comment date in CC Docket No. 88-135 is extended from July 8, 1988 to and including July 25, 1988.

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

THE OFFSHORE TELEPHONE COMPANY — File No. 55067-CL-P-184B-86

For a construction permit to establish a cellular system operating on frequency block B in the Domestic Public Cellular Radio Telecommunications Service for the Houma-Thibodaux, Louisiana Metropolitan Statistical Area (MSA)

MEMORANDUM OPINION AND ORDER

Adopted: June 28,1988; Released: July 20, 1988

By the Commission: Commissioner Dennis concurring and issuing a statement at a later date.

1. On August 3, 1987, the Mobile Services Division (MSD) released a *Memorandum Opinion and Order* (*Order*) dismissing the above-captioned cellular application of The Offshore Telephone Company (Offshore). *See The Offshore Telephone Company*, 2 FCC Rcd 4575 (1987). Offshore has filed an application for review of the MSD decision. SJI Inc. (SJI) has filed an opposition to Offshore's application for review.

2. In its *Order*, the MSD held that Offshore was ineligible to apply for a construction permit for the cellular wireline frequency in the Houma- Thibodaux MSA. The MSD found that Offshore did not satisfy the requirements of Section 22.902(b) of the Commission's Rules which, at the time Offshore filed its application, provided in pertinent part:

> [C]ommon carriers also engaged directly or indirectly in the business of affording *public landline* message telephone service will be assigned frequencies from Cellular System B in those general areas in which they provide such landline service (emphasis added).[1]

In particular, the MSD concluded that Offshore is not authorized to provide public landline message telephone service in any portion of the Houma market.

3. In its application for review, Offshore quotes from a Louisiana Public Service Commission (LPSC) letter dated January 23, 1987:[2]

> [T]his will certify that in areas that other exchange telephone carriers have declined or do not serve for any reason whatsoever, The Offshore Telephone Company is providing such service within the geographical boundaries of the State of Louisiana, including without limitation in Terrebone Parish, Louisiana.

Application for Review at 2.

Relying on this letter, Offshore argues that it provides service to telephone subscribers in the wetlands area of Terrebone Parish, and that this area is in a portion of the Houma-Thibodaux MSA. Therefore, Offshore alleges, the MSD erred in finding that Offshore does not provide local landline service in any portion of the Houma market.

4. Moreover, according to Offshore, the MSD *Order* ignores the fact that "Louisiana divides areas in which telephone companies are authorized to provide service based on maps filed with the Louisiana Public Service Commission" (Application for Review at 1). Offshore adds that it is the only telephone company that provides service to the wetlands area of Terrebone Parish, and that no telephone company has filed maps with the LPSC claiming service to this area.

5. Finally, Offshore states that it has a microwave license to provide service to telephone subscribers in Terrebone Parish. The application for review concludes that this Commission should reverse the MSD decision and grant Offshore's wireline cellular application.

6. In its opposition, SJI argues that Offshore is not authorized to, and does not, provide public landline message telephone service in the Houma-Thibodaux MSA. According to SJI, Offshore is not a local exchange telephone company but rather its service within the Houma market "is apparently limited to the provision of a dedicated channel connecting a customer's off-premise station to the customer's Centrex system" (Opposition at 2). Thus, SJI asserts, the MSD was correct in finding Offshore to be ineligible for the Houma wireline frequency and in dismissing its application.

DISCUSSION

7. We deny Offshore's application for review and affirm the dismissal of its cellular application for failure to meet the wireline eligibility requirement. We agree with the MSD finding that, although Offshore provides certain communications services to a limited group of subscribers located in the Gulf of Mexico, it is not engaged in the business of affording public landline service in any portion of the Houma-Thibodaux MSA. As a provider of radio service, Offshore does not comply with the plain meaning of the "public *landline* service" requirement of Section 22.902(b) of the Rules.

8. We find that the January 23, 1987 LPSC letter, relied upon in the application for review, does not support Offshore's contention that it provides public landline service in the Houma-Thibodaux MSA. Moreover, our review of the record leads to the conclusion that Offshore provides microwave, not public landline, service. The January 23, 1987 LPSC letter does not state anywhere that Offshore provides public landline service. Moreover, in its subsequent January 30, 1987 letter to this Commission, the LPSC states that:

> [The] Offshore Telephone Company has not constructed local exchange office or wire center in the traditional sense of a local exchange telephone company. The principal mode of telecommunications services has been through *radio* transmissions although it has asserted that fixed base facilities have been constructed on the landward side of the shoreline of Louisiana. There are no indications or records on file with the Public Service Commission filed by Offshore Telephone Company which reflect the filing of territorial service maps or the obtaining of franchises from local governing authorities to provide local exchange *landline* telephone service.

LPSC letter, January 30, 1987, p.2, emphasis added.

Indeed, in its application for review, Offshore characterizes itself as a microwave licensee serving Terrebone Parish. Furthermore, we do not find Offshore's argument regarding the filing of maps with the LPSC to be relevant evidence that it provides public landline service to the Houma market. The provision of microwave rather than public landline service in the Houma-Thibodaux MSA does not satisfy the requirement of Section 22.902(b).

9. For the foregoing reasons, we affirm the MSD's decision that Offshore's application was defective because it failed to meet the wireline eligibility requirement of Section 22.902(b). Therefore, we find that Offshore's wireline cellular application was properly dismissed.

10. Offshore has also filed a motion to stay the MSD's grant of SJI's cellular application and an application for review of that grant, arguing that the MSD had no authority to grant SJI's application while Offshore's application for review of its dismissal was pending before the Commission. SJI has filed an opposition to the motion to stay and the application for review of its grant. In light of our action affirming the MSD's dismissal, these additional pleadings are rendered moot, and therefore are dismissed.

ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the Application for Review filed by The Offshore Telephone Company IS DENIED.

12. IT IS FURTHER ORDERED that Offshore's Motion to Stay and Application for Review regarding the grant of SJI's application ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Currently, Section 22.902(b) provides that "common carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies from Cellular System B in those areas in which they provide such landline service in some portion of the cellular market." 47 C.F.R. 22.902(b), amended by order in Docket 85-388, August 25, 1986, 51 Fed. Reg. 26895. For report, see 60 Rad. Reg. 2d (P&F) 1029. Corrected by erratum (Mimeo No. 7132) released September 26, 1986. The amended rule required that the carrier be certificated in some portion of the MSA, but the word "certificated" was deleted from the amended rule by the erratum because many states do not grant such authority to provide landline service via a certification process. However, the deletion of the word "certificated" did not nullify the requirement that a wireline obtain authority to provide landline service in the MSA. *See Beehive Cellular, Inc.*, Mimeo No. 6381, released August 18, 1986, *aff'd*, 2 FCC Rcd 4505 (1987); *Montgomery* Independent Cellular Telephone Company, Inc., 2 FCC Rcd 4385 (1987), *aff'd*, 3 FCC Rcd 396 (1988).

[2] In reaching its decision, the MSD considered three LPSC letters discussing Offshore's telephone service -- the first dated December 17, 1986, the second January 23, 1987, and the third January 30, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-72
Phase I

In the Matter of

MTS and WATS
Market Structure
NECA Board of Directors

ORDER GRANTING WAIVER

Adopted: July 20, 1988; Released: July 21, 1988

By the Chief, Common Carrier Bureau:

1. Section 69.602(e) of the Commission's rules provides that, for 1988 and thereafter, the National Exchange Carrier Association (NECA) Board of Directors shall consist of six directors elected by subset I and subset II exchange carriers jointly and nine directors elected by subset III carriers.[1] On June 7, 1988, NECA filed with the Commission a Request for Waiver to allow NECA to elect a Board of Directors for 1989 that would be comprised of three members from subset I telephone companies, three members from subset II companies and nine members from subset III companies. NECA states that the requested waiver is an interim measure pending a decision by the Commission on a Petition for Rule Change filed by NECA on January 29, 1988.[2] NECA also contends that the proposed waiver is necessary in order for NECA to provide timely notice and to conduct official activities associated with the 1989 Board of Directors election.

2. In support of its request, NECA states that the proposed Board composition would better reflect NECA's membership given the advent of voluntary non-traffic sensitive (NTS) pooling as a result of the Commission's May 1987 *NTS Recovery Order*. [3] NECA notes that its requested waiver would not change the total number of directors provided for in the Commission's Rules to represent subsets I and II, but would ensure that representatives of both subset I and subset II companies would serve on the Board. According to NECA, its proposal would allow for a more representative Board than if those two subsets were jointly represented as the current rules provide. NECA observes that the Common Carrier Bureau has previously waived the application of Section 69.602 to permit changes in the NECA Board structure in order to balance the interests of the NECA subset companies.[4]

3. The Commission issued a public notice requesting comment on NECA's Request for Waiver on June 14, 1988.[5] Comments were filed by the Pacific Bell and Nevada Bell Telephone Companies (Pacific Bell) and the United States Telephone Association (USTA) in support of the NECA waiver request.[6] USTA states that NECA's proposal will ensure that representatives of both subset I and subset II companies will serve on the Board, and will not disturb the balance NECA has sought to achieve in Board representation of all sizes of local exchange carriers.[7] Pacific Bell also agrees with NECA that the interests of the NECA subset companies will be better balanced if the waiver is granted.[8]

4. Accordingly, IT IS ORDERED, that in light of the comments that have been received and the concerns that have been expressed by NECA with regard to achieving a balanced representation on its Board of Directors, a waiver of Section 69.602(e) of the Commission's Rules IS GRANTED for 1989 to change the composition of the NECA Board of Directors to three members from subset I companies, three members from subset II companies, and nine members from subset III companies.

5. This action is taken pursuant to the authority that is contained in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291 (1987).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. § 69.202(e) (1987). Section 69.602(a) divides the Association's membership into three subsets. The first subset (subset I) consists of "all of the Bell System Operating Companies except Cincinnati Bell Inc. and the Southern New England Telephone Company." The second subset (subset II) consists of "all other telephone companies with annual operating revenues in excess of forty million dollars." The third subset (subset III) consists of all exchange carrier members other than those that are members of subset I or subset II. *See* 47 C.F.R. § 69.602(a)(1)-(3) (1987).

[2] *See* Public Notice Report No. 1711, Petitions for Rule Making Filed, released Feb. 5, 1988. NECA's Petition requested that the composition of the NECA Board of Directors be changed for 1989 and thereafter to include three members from subset I, three from subset II, and nine from subset III companies. Three parties filed in support of the NECA Petition for Rule Change, and no oppositions were filed.

[3] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Reportand Order*, 2 FCC Rcd 2953 (1987) (*NTS Recovery Order*).

[4] *See* MTS and WATS Market Structure, CC Docket No. 78-72, Phase I: NECA Board of Directors, Mimeo No. 6949 (released Sept. 12, 1985); MTS and WATS Market Structure, CC Docket No. 78-72, Phase I: NECA Board of Directors, Mimeo No. CC 5377 (released June 27, 1986); MTS and WATS Market Structure, CC Docket No. 78-72, Phase I: NECA Board of Directors, 2 FCC Rcd 4702 (1987).

[5] Pleading Cycle established for Comments on NECA's Petition for Waiver of Section 69.602(e) of the Commission's Rules (CC Docket No. 78-72, Phase I), DA 88-891, released June 14, 1988.

[6] No reply comments were filed.

[7] USTA Comments at 1-2.

[8] Pacific Bell Comments at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-79

In the Matter of

Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies

ORDER

Adopted: July 18, 1988; Released: July 28, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The *BOC CPE Plans Order* [1] required Pacific Telesis (PacTel) to amend its plan for complying with the Commission's requirement that PacTel provide unaffiliated vendors of customer premises equipment (CPE) with meaningful opportunities to market Centrex and other network services jointly with CPE (the "joint marketing" requirement). On February 12, 1988, PacTel filed its amended plan. We approve this amended plan on a trial basis, subject to reassessment when we review the joint marketing programs of the other Bell Operating Companies (BOCs). Accordingly, PacTel may implement the provision of CPE on an unseparated basis when each of its plans for complying with the nonstuctural safeguards specified in the *BOC CPE Plans Order*, including the joint marketing requirement, is operational.[2]

II. BACKGROUND

2. The *BOC CPE Order* replaced the structural separation requirements governing BOC provision of CPE with nonstructural safeguards. These safeguards cover five areas: cost allocation, network information disclosure, customer proprietary network information (CPNI), nondiscrimination procedures and reporting, and joint marketing. [3] The Commission required the BOCs to submit plans describing how they would comply with the nondiscrimination, CPNI, and joint marketing requirements[4] and delegated authority to us to review those plans.[5]

3. The BOCs filed their compliance plans on April 13, 1987.[6] We approved the CPNI and nondiscrimination plans of all of the BOCs but required each of them to amend these plans in certain respects.[7] We also approved on a trial basis the joint marketing plans[8] of all of the BOCs except PacTel.[9] PacTel's joint marketing plan did not include a sales agency program. We required PacTel to file an amended plan that includes such a program or its functional equivalent. Pactel filed its amended joint marketing plan on February 12, 1988.

III. PACTEL'S AMENDED JOINT MARKETING PLAN

4. In its amended joint marketing plan, PacTel proposes to add a sales agency program to the Intermediary and Joint Marketing programs that it described in its original compliance plan.[10] PacTel states that initially it will pay commissions on the sale of Centrex, Commstar II, and Premiere services[11] and retain four to five sales agents in each of three local access transport areas (LATAs) - those encompassing the metropolitan areas of San Diego, Sacramento, and Reno.[12] It states that after an initial phase-in period, it intends to retain additional sales agents and expand both the geographic coverage of its program and the types of services for which it pays commissions.[13]

5. PacTel states that it will solicit vendors for participation in its sales agency program through advertisements placed in newspapers, trade journals, and similar publications. Pactel states that in selecting an agent, it will examine public information about the vendor's financial history; a credit reference from the vendor's bank; whether the vendor's product line is complementary to network services included in the sales agency program; the size of the vendor's sales and service force; whether the vendor has a satisfied customer base; and its past sales and service performance and installation and maintenance history.[14]

6. PacTel says that it will evaluate its sales agents on an ongoing basis based on their credit rating, sales volume, and the quality of their service to customers. Agent contracts will include negotiated sales volume expectations, and PacTel will provide corrective assistance to agents that do not meet these goals. In the event corrective assistance is ineffective in improving an agent's performance, PacTel reserves the right to terminate the agent's contract.[15] PacTel states that quality parameters may include customer satisfaction; quality of products; installation, maintenance, and repair services; and business practices.[16]

7. According to PacTel, it will pay its sales agents commissions on a per-line basis for network services they sell and for "add-ons" to systems they previously sold. In addition, PacTel will provide various support services to its agents to facilitate their sale of network services. Planned support services include product training, provision of agent handbooks and brochures, network design, and applications development. PacTel will provide these services at no cost to sales agents unless the agents' requirements for such services are unusual or excessive, in which case it may charge a fee.

IV. POSITIONS OF THE PARTIES

A. *Comments*

8. The Independent Data Communications Manufacturers Association (IDCMA), the People of the State of California and the Public Utilities Commission of the State of California (California), and the North American Telecommunications Association (NATA) filed comments on PacTel's amended joint marketing plan. IDCMA opposes the plan and California argues that certain aspects of the plan are inconsistent with state law and require its approval before the plan can be implemented. NATA urges us to approve the plan.

9. IDCMA opposes PacTel's plan on several grounds. Reiterating the arguments it made against Bell Atlantic's joint marketing proposal, which we approved in the *BOC*

CPE Plans Order, IDCMA claims that a limited sales agency program, even when coupled with vendor support activities, does not satisfy the joint marketing requirement. IDCMA argues that PacTel's proposed sales agency program is too limited in the number of services it encompasses, the geographic areas it includes, and the number of sales agents in each such area. IDCMA states that PacTel should be required to "open up" its sales agency program to a "variety of vendors marketing a wide range of CPE along with a significantly increased number of network services."[17]

10. IDCMA also challenges other aspects of PacTel's sales agency plan. For example, it asserts that PacTel does not adequately describe its selection criteria for sales agents. It states that although PacTel lists certain selection criteria, PacTel does not indicate the weight to be accorded each of these criteria or whether PacTel will also consider other factors.[18] IDCMA also objects to language in PacTel's sample sales agency contract that, IDCMA claims, would require an agent to sell network services to a customer even if that agent did not sell its own CPE to that customer.[19] Finally, noting that PacTel reserves the right to modify its sales agency plan, IDCMA argues that PacTel should be required to notify the Commission of any significant changes in its program.[20]

11. California expresses concern with two aspects of PacTel's sales agency plan. First, it states that the commissions that PacTel will pay its sales agents will allow the agent to market state-tariffed services at below- tariff rates.[21] Second, it argues that sales agents are in effect resellers and that the limited number of sales agents PacTel will retain is at odds with state regulations for resellers, which provide that any entity meeting certain eligibility criteria can be treated as a reseller.[22] California claims that because of these deviations from state law, PacTel must receive prior state authorization before implementing its sales agency plan.

12. NATA supports PacTel's plan and urges us to approve it. It takes issue with California's claims, arguing that they are based on a misunderstanding of the sales agency concept. It notes that under the terms of PacTel's proposed sales agency contract, PacTel's sales agents must sell network services at tariffed rates. It also denies that sales agents may be considered resellers. Sales agents, it states, do not buy network services for resale, do not control the price or terms on which they offer services to third parties, and do not bill or receive payment from third parties. They simply act as commissioned agents for the telephone company. In contrast, resellers, it states, do purchase network services for their own account, which they market to third parties at prices and terms they set. They bill third parties for the services they sell and are, in turn, billed themselves by the telephone company for the services they purchase.

B. *Reply Comments*

13. IDCMA and PacTel filed reply comments. IDCMA reiterates its argument that a sales agency program in limited geographic areas, for limited services, and for a limited number of sales agents should be disapproved. It states that while it is encouraged by PacTel's assurances of future additions to the program, these assurances do not provide a present basis for approving the plan. It argues that since PacTel will offer its program in three LATAs for a limited number of services, we should grant structural relief to PacTel only in those LATAs and for sales of those services.

14. PacTel denies that its sales agency plan is too limited in scope to satisfy the joint marketing requirement. It notes that its plan is similar to one or more of the other BOCs' plans, which we approved in the *BOCCPE Plans Order* and held out as a model that PacTel might follow in designing its sales agency program.[23] It further notes that we expressly declined to require the BOCs to include all network services in their sales agency programs, but instead encouraged the BOCs to expand their programs to additional services and established a two-year review period to assess the progress of the sales agency programs as a means of fulfilling the joint marketing requirement. PacTel states that it intends to expand its program in the future and that this two-year review period is more than adequate to ensure that such expansion does occur. Indeed, it states, a limited introduction of the program will enable it to "fine-tune" its program, adjust resource allocations, and ensure the efficiency of its systems before undertaking such expansion.

15. PacTel also opposes IDCMA's request that the Bureau require PacTel to provide notice of all significant changes in its sales agency program. It states that such a requirement would inhibit its flexibility in adjusting its program to customer and market needs and is unnecessary in light of the two-year reassessment period. PacTel also denies that it fails to describe adequately its selection criteria for sales agents. It states that its criteria do not differ from those employed by the other BOCs. Finally, it states that it will amend its sales agency contract to permit sales agents to refer customers to another sales agent, so that agents do not have to sell network services to a customer to whom they cannot sell CPE.

16. In response to California's comments, PacTel states that sales agents will be required to market network services in accordance with state tariffs and that sales agents will not be resellers, since customers will pay PacTel directly for network services.

V. DISCUSSION

17. We approve PacTel's amended joint marketing plan subject to review when, in accordance with the *BOC CPE Plans Order*, we reevaluate the other BOCs' joint marketing programs. To facilitate evaluation of PacTel's joint marketing plan at that time, we require PacTel to file the reports on its sales agency program specified in the *Sales Agency Reconsideration Order*.[24] Pacific should file these reports at the end of 1988 and annually thereafter until further notice. In addition, we require PacTel to include in its reports data in its possession on network sales by participants in its Intermediary Marketing program.[25]

18. We are not persuaded by IDCMA's argument that PacTel's sales agency program is too limited in scope to satisfy the joint marketing requirement. First, IDCMA does not adequately address PacTel's Intermediary and Joint Marketing programs. The Intermediary Marketing program, in particular, represents a potentially beneficial supplement to PacTel's sales agency program since it is open to all vendors. Indeed, PacTel's combination of a sales agency program with its Intermediary and Joint Marketing programs may be a superior way of satisfying the joint marketing requirement than a sales agency program alone.[26] Second, PacTel's sales agency program, is still in

an an early stage of development. PacTel has represented that it intends to expand its program as it gains additional experience administering its program. Because we plan to review the status of this and other joint marketing programs in the relatively near future, we see no reason to interfere with the evolution of PacTel's program at this time. Third, as we stated in the *BOC CPE Plans Order*, we are reluctant to require BOCs to pay commissions on all or virtually all network services, without regard to market conditions, since this could be inefficient and might even affect local service rates.[27]

19. We also reject IDCMA's argument that PacTel has not adequately described its criteria for choosing sales agents. PacTel has listed the criteria it will consider, and we find these criteria to be fair and reasonable. The particular weight that PacTel accords to each criterion is within its own sound discretion so long as PacTel applies them consistently with the goals of the Commission's joint marketing requirement.[28] If, after reassessing the joint marketing programs of PacTel and the other BOCs, we find that a program is not furthering the goals of this requirement, we will recommend to the Commission any needed modification or supplement to such a program.[29]

20. Finally, California's concerns about resale are misplaced. The sales agency programs established pursuant to the Commission's rules, including PacTel's program, do not create a reseller relationship between a BOC and its sales agents. A reseller purchases network services from one or more sources and sells these services to its own customers at terms and prices it sets. A sales agent, as PacTel describes it, does not purchase network services for resale, nor does it sell these services in its own right.[30] It does not set terms and prices, nor does it bill customers for their network service usage. It simply acts as an agent of the BOC.

21. Similarly, California's concern that sales agents will sell network services at below-tariff rates is unfounded. Both in its sales agency plan and proposed sales agency contract, PacTel states that its agents will be required to sell network services at tariffed rates.[31] Since PacTel, and not its sales agents, will bill customers for PacTel's network services, PacTel will be able to ensure that this requirement is satisfied.

VI. ORDERING CLAUSE

22. Accordingly, IT IS ORDERED, that pursuant to Sections 4(i), 4(j), 201-205, 218, 220, 403, and 404 of the Communications Act, 47 U.S.C. §§ 4(i), 4(j), 201-205, 218, 220, 403, and 404, and authority delegated thereunder pursuant to Sections 0.91(h) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91(h) and 0.291, and the *BOC CPE Order*, 2 FCC Rcd 143 (1987), the joint marketing plan of PacTel is APPROVED to the extent specified herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, *Order*, 3 FCC Rcd 412 (1988).

[2] *See* Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, *Report and Order*, 2 FCC Rcd 143, 163, paras. 139-140 (1987), *(BOC CPE Order), modified on reconsideration*, 3 FCC Rcd 22 (1988) *(Reconsideration Order)*.

[3] For a detailed description of these safeguards, see *BOC CPE Order*, 2 FCC Rcd at: 149, paras. 36-40 (accounting); 149-151, paras. 41-54 (network disclosure); 151-153, paras. 55-70 (CPNI); 153-155, paras. 71-85 (nondiscrimination); and 155-156, paras. 86-94 (joint marketing).

[4] The cost allocation rules were established in the *Joint Cost* proceeding. Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, 2 FCC Rcd 1298 (1987), *modified on reconsideration*, 2 FCC Rcd 6283 (1987). We have conditionally approved the BOCs' cost allocation manuals. The Commission did not require the BOCs to file plans describing how they would comply with the network disclosure rules.

[5] *See BOC CPE Order*, 2 FCC Rcd at 164, para. 145. Several parties petitioned for reconsideration of various aspect of the nonstructural safeguards established in the *BOC CPE Order*. The *Reconsideration Order* denied petitions to modify or eliminate the network information disclosure, CPNI, and joint marketing safeguards. The Commission did, however, modify the nondiscrimination rules by establishing an alternative to maintenance reporting, and it also clarified certain aspects of the CPNI safeguard. *See Reconsideration Order*, 3 FCC Rcd at 26, paras. 22, 30-31.

[6] On May 13, 1987, Bell Atlantic filed an addendum to its compliance plan supplementing its description of its joint marketing program.

[7] The BOCs filed amended CPNI and nondiscrimination plans on January 22, 1988. On May 11, 1988, we largely approved these amended plans but required further amendments to the CPNI plans. *See* Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, *Order*, CC Docket No. 86-79 (released May 11, 1988).

[8] Each of the approved plans included a sales agency program. Under the BOCs' sales agency programs, the BOCs retain unaffiliated CPE vendors as agents for the sale of certain network services and pay commissions to these agents when they sell such services. These programs facilitate integrated marketing of CPE and network service by independent CPE vendors.

[9] We approved these plans on a trial basis, subject to reassessment in two years. Because the programs were, and indeed still are, in a developmental stage and are growing without regulatory intervention, we concluded that we should allow the programs to continue to evolve and, at the end of the two- year period, reassess these programs as vehicles for joint marketing opportunities. *See BOC CPE Plans Order*, 3 FCC Rcd at 421, para. 71-72.

[10] For a description of PacTel's Intermediary and Joint Marketing programs see PacTel Compliance Plan at Appendix III (incorporated by reference in the PacTel Amended Joint Marketing Plan): *BOC CPE Plans Order*, 3 FCC Rcd at 420, paras. 60-61. PacTel states that although it will retain its Intermediary and Joint Marketing programs, it may alter these programs in certain respects to redirect resources to meet the objectives of its amended joint marketing plan. PacTel Amended Joint Marketing Plan at 4.

[11] Both Comstar II and Premiere are Centrex-type service packages for smaller customers - *i. e.*, those with fewer lines than customers that would use Centrex service.

[12] PacTel Amended Joint Marketing Plan at 5.

[13] PacTel Reply at 11.

[14] PacTel Amended Joint Marketing Plan at 4.

[15] *Id.* at 8 and Sample Network Services Marketing Agreement, Exhibit A at 10.

[16] PacTel Amended Joint Marketing Plan at 10.

[17] IDCMA Comments at 5. On February 1, 1988, IDCMA filed an application for review of our decision in the *BOC CPE Plans Order*. That IDCMA application seeks reversal of our decision to approve the joint marketing plans submitted by the other BOCs and asks the Commission to require the BOCs to include all network services in their sales agency programs.

[18] *Id.* at 4.

[19] *Id.*

[20] *Id.* at 3.

[21] California Comments at 2-3.

[22] *Id.* at 3.

[23] PacTel Reply at 7.

[24] American Information Technologies Corp., BellSouth, and NYNEX, Interim Capitalization Plans for the Furnishing of Customer Premises Equipment and Enhanced Services, *Memorandum Opinion and Order*, FCC 85-582 (released Nov. 15, 1985) at para. 30.

[25] PacTel has offered to file such data with the Commission on a confidential basis. *See* PacTel Compliance Plan, Appendix III at 12. At the time it files the required reports, PacTel is, of course, free to request that such data be treated confidentially.

[26] We further note that IDCMA's argument is in the nature of an untimely petition for reconsideration, since the Commission has already concluded that existing sales agency programs, which similarly do not encompass all network services, would satisfy the joint marketing requirement of the *BOC CPE Order*. See BOC CPE Plans Order, 3 FCC Rcd at 421, para. 70.

[27] See id. at 422, para. 70.

[28] See BOC CPE Order, 2 FCC Rcd at 156, paras. 89-94.

[29] Moreover, because we are applying the annual reporting requirement established in the Sales Agency Reconsideration Order to PacTel's sales agency plan and will soon review the joint marketing programs of each of the BOCs, we find it unnecessary to require PacTel to notify us each time it alters its program. Upon our review of each of the BOC's program, we will consider the need for a continuing reporting obligation to ensure that each BOC maintains its commitment to its joint marketing program.

[30] PacTel Reply at 17-18.

[31] See PacTel Amended Joint Marketing Plan at 8; Network Services Marketing Agreement at Section 1(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-589

In the Matter of

Amendment of Section 73.202(b), RM-6108
Table of Allotments,
FM Broadcast Stations.
(Creswell, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 1, 1988; Released: July 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Visionary Radio Euphonics of Oregon, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 63 (1988), proposing the substitution of Channel 237C2 for Channel 237A at Creswell, Oregon, and the modification of petitioner's license for Station KZAM to specify the higher powered channel. Petitioner filed comments supporting the allotment and reiterating its intention to apply for the channel, if allotted. Reply comments were filed by Alexander Broadcasting Company (Alexander), licensee of Station KXL-FM, Channel 238C, Portland, Oregon. No other pleadings were received.

2. Alexander notes that the allotment of Channel 237C2 to Creswell requires a site restriction of 11.7 kilometers (7.3 miles) south to avoid a short-spacing to its Portland station and that petitioner *sub silentio* accepts the site restriction. However, according to Alexander, the Commission requires that proponents actively provide a reasonable assurance that sites are available within the restricted area which will comply with the Commission's city-grade and line-of-sight requirements. It argues that the failure to do so requires the denial of the proposal. In support, it cites *Pinckneyville, Illinois*, 41 RR 2d 69 (1977), *Blackshear, Richmond Hill, and Folkston, Georgia*, 2 FCC Rcd 3323 (1987), *Valley Springs, California*, 2 FCC Rcd 2036 (1987), and *Wadley and Dadeville, Alabama*, 60 RR 2d 1462 (1986). Alexander appears to believe that this policy is especially relevant here, stating that an examination of relevant geological maps shows that the area surrounding Creswell consists of mountainous terrain.

3. Alexander is correct that we will not allot a channel absent a reasonable assurance that transmitter sites are available which will permit a station to operate in compliance with the Commission's technical requirements. Generally, the Commission assumes that a Class C2 allotment with a site restriction of less than 32 kilometers can comply with the required 70 dBu city-grade and line-of-sight service requirements. However, where, as here, a substantial question is raised as to the availability of such a site, the Commission requires the proponent to provide an engineering study showing that the allotment can indeed be made in conformance with the technical rules. This the petitioner has failed to do. In addition, a staff analysis has confirmed that there is an obstruction approximately 120 meters in height between the restricted transmitter site and Creswell, thus causing shadowing to the western side of Creswell.

4. Accordingly, based on the above discussion, we believe that Channel 237C2 cannot be allotted to Creswell in conformance with the Commission's technical requirements. Therefore, IT IS ORDERED, That the petition of Visionary Radio Euphonics of Oregon, Inc. to substitute Channel 237C2 for Channel 237A at Creswell, Oregon, IS DENIED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-482

In the Matter of

Amendment of Section 73.202(b),	RM-5974
Table of Allotments,	
FM Broadcast Stations.	
(Hartford, Vermont)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 29, 1988 **Released: July 29, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 6783 (1987), issued in response to the petition for rule making filed by William A. Wittik (petitioner), proposing the allocation of Channel 282A to Hartford, Vermont, as that community's first local FM service. Petitioner filed supporting comments stating his intention to apply for the channel.

2. Petitioner, in its comments, also suggests that an allotment of at least one other channel at Hartford be considered to meet the demand for a variety of specialty programming not currently offered by existing stations. Petitioner contends that the "recent proliferation of applications for FM translators and/or boosters" indicate the need for an additional channel.

3. We find that no other party has expressed an interest in applying for an additional channel at Hartford. Therefore, in view of the aforementioned, we believe the public interest would be served by allocating Channel 282A to Hartford, Vermont, as that community's first FM service. The channel can be allotted to Hartford in compliance with the Commission's minimum distance separation requirements.[1] Since Hartford is located within 320 kilometers (200 miles) of the U.S.-Canadian border, we have obtained concurrence of the Canadian government.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Hartford, Vermont	282A

5. The window period for filing applications will open on **September 13, 1988,** and close on **October 13, 1988.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates are 43-39-38 and 72-20-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-384

In the Matter of

Amendment of Section 73.202(b), RM-5903
Table of Allotments,
FM Broadcast Stations.
(Hot Springs, Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 29, 1988; Released: July 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Koinonia Broadcasting Company (petitioner), licensee of AM Station WWES, Hot Springs, Virginia, the Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 5859 (1987), proposing the allotment of Channel 296A to Hot Springs, Virginia, as that community's first local FM service. Petitioner submitted late-filed comments reaffirming its intention to apply for the channel.[1]

2. We believe the public interest would be served by allotting Channel 296A to Hot Springs, Virginia, as a first local FM service. Channel 296A can be allotted to Hot Springs in compliance with the Commission's minimum distance separation requirements. The coordinates used in determining an available site are 38-00-06 and 79-50-00. In addition, this allotment is located within the protected areas of the National Radio Astronomy Observatory "Quiet Zone" at Green Bank, West Virginia. Therefore, applications must conform with the notification requirements of Section 73.1030(a) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Hot Springs, Virginia	296A

4. The window period for filing applications will open on **September 13, 1988,** and close on **October 13, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] We have accepted the late-filed comments in order to permit the petitioner to restate its intention to apply for the proposed allotment.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-104

In the Matter of

Amendment of Section 73.202(b),	RM-5425
Table of Allotments,	RM-5612
FM Broadcast Stations.	RM-5972
(Jennings, Erath, Mamou and	RM-5989
Maurice, Louisiana; and Groves	RM-5990
and Nederland, Texas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 13, 1988; Released: July 29, 1988

By the Deputy Chief, Policy and Rules Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 2 FCC Rcd 2299 (1987), seeking comments on two optional proposals for the substitution of Channel 223C2 for either Channel 224A at Jennings, Louisiana, or for Channel 221A at Groves, Texas, at the request of Jennings Broadcasting Company, Inc. (Jennings Broadcasting), and Voice in the Wilderness Broadcasting, Inc. (Voice), respectively.

2. In response to the *Notice*, Jennings Broadcasting, licensee of Station KJEF-FM, Channel 224A, Jennings, Louisiana and Voice, licensee of Station KTFA(FM), Channel 221A, Groves, Texas, filed comments reaffirming an interest in the modification of their respective stations' licenses. In addition, counterproposals were submitted by Voice suggesting the substitution of Channel 299A for Channel 225A at Erath, Louisiana, in order to permit the substitution of Channel 225C2 for Channel 224A at Jennings; Leonard Worden (Worden), for allotment of Channel 223A to Mamou, Louisiana, as that community's first local FM service; and Roy E. Henderson (Henderson), licensee of Station KLEF-FM, Channel 221A, Seabrook, Texas, seeking the substitution of Channel 221C2 for Channel 221A at Seabrook.[2] Voice filed reply comments and a supplement thereto. Reply comments were also filed by Henderson and KRTS, Inc. (KRTS). [3] Additionally, Voice, Jennings Broadcasting, Henderson and Sandlin Broadcasting Company, Inc. (Sandlin)[4] filed joint reply comments, and a supplement thereto. Additional reply comments were filed by Jennings Broadcasting suggesting an alternative channel for resolving the conflict at Mamou.[5]

BACKGROUND

3. In the *Notice*, the Commission alternatively proposed the modification of the licenses for Stations KJEF-FM, Channel 224A, and KTFA(FM), Channel 221A, to specify operation on Channel 223C2, as a first wide coverage area service at Jennings and Groves, respectively. We also proposed to have Channel 221A, at Nederland, Texas, reallocated to Groves to reflect its actual usage in that community.[6] The proposals were considered mutually exclusive because the separation between Jennings and Groves is less than the 190 kilometers required for Class C2 co-channel allotments.

4. Voice suggests that in order to resolve the conflict between the Jennings and Groves proposals, Channel 225C2 be substituted for Channel 224A at Jennings, instead of Channel 223C2, thereby permitting the substitution of Channel 223C2 for Channel 221A at Groves. In order to accomplish the substitution at Jennings, Voice's proposal required the substitution of Channel 299A for vacant but applied for Channel 225A at Erath, Louisiana.[7] Voice states that granting its counterproposal would permit expanded service to be provided to 306,499 people.

5. Worden expresses his desire to apply for the Channel 223A if allotted to Mamou, Louisiana. He states that Mamou, population 3,194 persons, is deserving of its first local FM service. The Mamou proposal conflicts with the proposal for Channel 223C2 at Jennings.

6. In a separate petition for rule making, FoxCo Acquisition Corporation (FoxCo), licensee of Station KFXZ(FM), Channel 292A, Maurice, Louisiana requests the substitution of Channel 299A for Channel 292A at Maurice. FoxCo claims that its present allocation is on a "congested channel" which substantially restricts its future plans to relocate its existing tower site. FoxCo states that the substitution would allow more potential for tower relocation to gain a net increase of 49,596 people or 32 percent in additional population served. This proposal would be precluded by Voice's counterproposal, involving the substitution of Channel 299A for Channel 224A at Erath. Therefore, we are considering the FoxCo proposal herein.

7. Support for Voice's counterproposal was made in the joint reply comments of Voice, Jennings Broadcasting, Henderson and Sandlin. In separate reply comments, Jennings Broadcasting agrees to accept Channel 225C2 and modify its station's facilities accordingly on Channel 225C2. Jennings Broadcasting suggests Channel 266A as an alternative allotment at Mamou to remove the conflict.

DISCUSSION

8. We find that the Maurice proposal does not warrant further consideration because, as submitted, it provides insufficient public interest benefit. FoxCo's future plans to improve service to Maurice provides no public interest benefit, since it failed to present a specific proposal to improve its facilities. A "congested channel" is insufficient cause to warrant a channel substitution for equal channels. The Maurice proposal simply represents a site preference. Therefore, we have determined that the Maurice proposal does not provide a valid public interest benefit and is unacceptable for consideration.

9. Our engineering analysis confirms the availability of alternative channels at Jennings (Channel 225C2) and Mamou (Channel 266A). We note that the proposed allotment of Channel 223A at Mamou is not mutually exclusive with the Groves proposal. However, since Channel 223A would require a significant site restriction, we are concerned that a city-grade (70 dBu) signal over the community of Mamou may not be possible. Thus, we believe Channel 266A should be considered in lieu of Channel

223A at Mamou. Therefore, channels can be allocated to Groves, Jennings and Mamou without the need for a community comparison.

10. Channels can be allotted to all three communities in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules. Channel 266A can be allotted to Mamou without the imposition of a site restriction.[8] Channel 223C2 can be allotted to Groves as a substitute for Channel 221A at the present transmitter site of Station KTFA(FM).[9] The substitution of Channel 225C2 for Channel 224A at Jennings requires a site restriction of 24.8 kilometers (15.4 miles) south of that community.[10] This restriction is necessary to avoid a short spacing to Station KQID(FM), Channel 226C, Alexandria, Louisiana. In addition, in order to accomplish the channel substitution at Jennings, Channel 299A must be substituted for vacant but applied for Channel 225A at Erath.

11. In view of the aforementioned, we believe the public interest would be served by the allotment of Channel 266A to Mamou, Louisiana, the substitution of Channnel 223C2 for Channel 221A at Groves, Texas and the substitution of Channel 225C2 for Channel 224A at Jennings, Louisiana. A first local FM service can be provided at Mamou and both Groves and Jennings could receive expanded radio service. In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the licenses of Station KTFA(FM) at Groves and Station KJEF-FM at Jennings, to specify operation on Channel 223C2 and Channel 225C2, respectively.

12. The four applicants for Channel 225A at Erath will be served with a copy of this *Order* and should amend their applications to reflect Channel 299A in lieu of Channel 225A. In accordance with Commission policy, the applicants will retain filing protection for their pending applications.

13. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Erath, Louisiana	299A
Jennings, Louisiana	225C2
Mamou, Louisiana	266A
Groves, Texas	223C2

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the licenses of Station KJEF-FM, Jennings, Louisiana and Station KTFA(FM), Groves, Texas, ARE MODIFIED, to specify operation on Channel 225C2 in lieu of Channel 224A and Channel 223C2 in lieu of Channel 221A, repectively, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

15. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send copies of this *Order*, CERTIFIED MAIL RETURN RECEIPT REQUESTED, to the following applicants for Channel 225A at Erath, Louisiana:

Solo Music Co. of Louisiana, Ltd
RTE 1, Box 837A
Erath, LA 70533

Tri Parish Broadcasting Limited
502 East Edwards Street
Erath, LA 70533

Jay-Winn Broadcasting, Ltd
126 Carolyn St.
Lafayette, LA 70503

Erath Broadcasting
106 Estate Drive
New Iberia, LA 70560

16. IT IS FURTHER ORDERED, That the petition for rule making (RM-5972) filed by FoxCo Acquisition Corporation for the substitution of Channel 299A for 292A at Maurice, Louisiana, IS DENIED.

17. IT IS FURTHER ORDERED, That the petition for rule making (RM-5425) filed by Jennings Broadcasting Company, Inc. for the allotment of Channel 223C2 at Jennings, Louisiana, IS DENIED.

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

19. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Erath, Mamou and Maurice, Louisiana have been added to the caption.

[2] Public Notice of the counterproposals for Erath (RM-5990) and Mamou (RM- 5989) was given on July 2, 1987, Report No. 1666. Subsequently, the Erath proposal was clarified in Public Notice of July 23, 1987, Report No. 1669. In a separate proceeding, MM Docket No. 87-276, the Seabrook proposal was accepted for consideration. *See* 2 FCC Rcd 4666 (1987).

[3] KRTS subsequently became the licensee of Station KLEF-FM at Seabrook, Texas.

[4] Sandlin is licensee of Station KMKS-FM, Channel 273C2, Bay City, Texas. *See Bay City, Texas*, 53 FR 8904, March 18, 1987.

[5] Oakdale Limited Partnership (Oakdale Limited), licensee of Station KICR-FM, Channel 285A, Oakdale, Louisiana submitted a motion to consolidate this proceeding with MM Docket No. 87-196 (Lafayette, Louisiana), MM Docket No. 87-208 (Bay City, Texas) and MM Docket No. 87-276 (Seabrook, Texas). Oppositions to the motion were filed by KRTS and Voice. C.R. Crisler (Crisler) responded with two sets of reply comments. Oakdale Limited filed a consolidated reply to oppositions. A Motion to Dismiss was filed by Jennings Broadcasting. Oakdale Limited filed a motion to strike, to which Crisler submitted an opposition. Oakdale's consolidation request is untimely in this docket, and, in any event, has been separately denied in Docket No. 87-196. *See Lafayette, Louisiana, recon. denied*, adopted July 13, 1988. Therefore, all subseqently filed pleadings are moot.

[6] The revised FM Table of Allotments implementing BC Docket No. 80-90 listed the actual community of license for Channel 221A at Groves, Texas. *See* 52 FR 39774, October 23, 1987. Thus, the reallotment of Channel 221A from Nederland to Groves is no longer necessary.

[7] Four applications are pending for the use of Channel 225A at Erath.

[8] The center city coordinates are 30-37-54 and 92-25-12.

[9] The site coordinates are 30-01-45 and 93-52-59.

[10] The proposed site coordinates are 30-00-20 and 92-44-00. Jennings Broadcasting will be required to relocate its current transmitter site.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-196

In the Matter of

Amendment of Section 73.202(b), RM-5492
Table of Allotments,
FM Broadcast Stations.
(Lafayette, Louisiana)

MEMORANDUM OPINION AND ORDER

Adopted: July 13, 1988; Released: July 29, 1988

By the Chief, Policy and Rules Division:

INTRODUCTION

1. The Commission has before it petitions for reconsideration filed by C. R. Crisler (Crisler) and Oakdale Limited Partnership (Oakdale) of the *Report and Order*, 2 FCC Rcd. 7303 (1987) which denied the petition for rule making filed by Crisler proposing the substitution of Channel 238C2 for Channel 238A at Lafayette, Louisiana, and denied the proposal by Oakdale to upgrade its Station KCIR(FM) from Channel 285A to Channel 239C2. Jennings Broadcasting Company, Inc., petitioner in a rule making in MM Docket No. 87- 104 (*see Notice of Proposed Rule Making*, 2 FCC Rcd. 2299 (1987)) filed a consolidated Opposition. KTRS, Inc. (KTRS), Voice In The Wilderness Broadcasting, Inc. (Voice), and Roy E. Henderson (Henderson), filed a Consolidated Joint Opposition To Petitions For Reconsideration.[1] Oakdale submitted a Reply to the Consolidated Joint Opposition To Petitions For Reconsideration. Oakdale also filed a Motion To Consolidate this proceeding with Docket 87-104 and proceedings related thereto. Finally, Crisler submitted a Letter requesting reinstatement of his application for Channel 238A in an adjudicatory proceeding, MM Docket No. 87-449, and a Motion For Stay of Effective Dates in this proceeding, Docket 87-104 and all related proceedings.

BACKGROUND

2. Crisler's Petition For Reconsideration requests that the Commission reconsider the denial of his proposed substitution of Channel 238C2 for Channel 238A at Lafayette, and that the Commission upgrade the channel and reopen the filing window. Channel 238A was alloted to Lafayette in MM Docket No. 84-231. *See First Report and Order*, 50 FR 3514, January 25, 1985. At the time of the *Report and Order* in this proceeding, there were seventeen applicants competing for the use of this Class A Channel. The applicants were designated for hearing on October 26, 1987. The *Report and Order* gave three reasons for the denial. First, several of the applicants for 238A had objected to the proposed upgrade, and Commission policy is not to open a new window over the objection of the applicants. Second, because the applicant group for Channel 238A had been designated for hearing during the pendency of this proceeding, opening a new filing window would have burdened the Commission's resources by requiring reprocessing of a new set of applications on the new allotment. Third, opening a new filing window would unjustifiably delay the initiation of new service at Lafayette.

3. In his Petition For Reconsideration, Crisler challenges the factual predicate for denial of the upgrade. Crisler asserts that no applicants for 238A objected to the upgrade to 238C2 and that, although only Crisler formally expressed interest in 238C2, several applicants supported the upgrade. Thus the legal arguments in Crisler's Petition for Reconsideration are based on a mistaken determination that no applicants objected to the upgrade.[2]

4. Crisler specifically opposes the Branch's determination that the burden of opening the window and reprocessing the existing and any new applications is prohibitively inefficient. Crisler contends that because the Commission held his upgrade proposal for over a year without acting upon it, and because it waited to propose the upgrade until after the designation for hearing of the applications for Channel 238A, the burden of processing existing and new applications was caused by the Commission's inaction. Thus, Crisler implies that it was unfair to use administrative inefficiency as a basis for rejecting Crisler's upgrade proposal.

5. Crisler also contends that the Branch's decision in *Bella Vista, Arkansas*, 2 FCC Rcd. 7415 (1987), is a precedent which governs the matter before us. In that case, the Commission granted a petition filed by JEM Broadcasting Company (Jem), licensee of Station KJEM(AM), Bentonville- Bella Vista, Arkansas, to substitute Channel 239C2 for Channel 239A and to allow Jem to modify its permit to specify operation on Channel 239C2. Oppositions to the petition were filed alleging that if Jem's station were upgraded, Jem could not provide a 70 dBu signal over the entirety of Bella Vista, and Jem would violate Section 73.3555 of the Commission's Rules because it owned an FM station within the 1 mV/m contour of proposed Channel 293C2. The Commission denied the Oppositions and stated that the grant of Jem's petition was warranted because it conforms to the Commission's policy, stated in MM Docket No. 84-231, to allot the highest class of channel to a community for which an interest is expressed. 2 FCC Rcd at 7146. Crisler submits that *Bella Vista*, by reinforcing that policy, obliged the Branch to favor the Lafayette upgrade. Crisler further submits that the refusal to follow the *Bella Vista* precedent violated the requirement which Crisler alleges were established in *Helena, Montana*, 50 RR 2d 70 (1981), i.e. that the Commission cannot change a precedent without first holding a rule making proceeding. Crisler argues that, as a result of our alleged departure from the *Bella Vista* precedent, the interests of the community of Lafayette and of the public, as well as those of Crisler, have been harmed. Specifically, Crisler alleges that the Commission's denial of his upgrade proposal has deprived Lafayette of a third, and possibly a fourth, wide area FM. Crisler asserts that there was no reason to overrule Commission policies favoring upgrades, and contends that in the future, parties who petition for an upgrade can be precluded from obtaining them due to the supposed anti-upgrade precedent which Crisler alleges is established by the *Report and*

Order in this proceeding. Crisler concludes that Section 307 of the Communications Act of 1934, as amended, left the Commission "no choice" but to implement his proposed upgrade as requested.

6. In its Petition for Reconsideration, Oakdale, licensee of KCIR(FM), Oakdale, Louisiana, requests that the Commission reconsider the rejection of its counterproposals in this proceeding. During the rule making below, Oakdale's first counterproposal requested the substitution of Channel 239C2 for Channel 285A at Oakdale, Louisiana, and modification of KCIR's license accordingly. To implement this upgrade proposal, it also proposed the substitution of either Channel 299C2 or Channel 299A at Lafayette. Oakdale identified Channel 254C2 as an alternative allotment for Oakdale in the event any other party were to express an interest in a Class C2 station at that community.

7. In the *Report and Order*, Oakdale's first counterproposal was dismissed as technically unacceptable. The *Report and Order* found that Channel 239C2 was short-spaced by 16.1 kilometers to Channel 238A at Lafayette. The required substitution of 299C2 for 238A at Lafayette was, in turn, short-spaced to Station KOGM(FM), Channel 296A at Opelousas, Louisiana, by 20.7 kilometers and to Station KCIL(FM), Channel 298C1 at Houma, Louisiana, by 7.4 kilometers. Moreover, Oakdale's proposal conflicted with a timely filed counterproposal in Docket 87-104 to allot Channel 299A to Erath, Louisiana. Oakdale also failed to demonstrate that its alternative proposed substitution of Channel 299A for Channel 238A at Lafayette would meet the spacing requirements for the sites specified in each of the applications for Channel 238A on file as of the date its original petition was submitted.

8. In its Petition for Reconsideration, Oakdale contends that the fact that 239C2 at Oakdale was short-spaced to 238A in Lafayette is no basis for refusing to consider Oakdale's proposal to upgrade to 239C2. First, Oakdale argues that the purpose of the rule making in this proceeding was to replace 238A at Lafayette with a different channel, and therefore separation requirements were irrelevant so long as a suitable replacement allotment was proposed. Second, Oakdale disputes the finding that the assignment of Channel 299C2 to Lafayette would be short-spaced to KOGM and KGIL. Oakdale acknowledges that that assignment would be short-spaced at the reference point to those stations, but contends that there is an open area where 299C2 could be placed at Lafayette in conformity with all spacing and city coverage requirements.

9. Oakdale further opposes the finding that Oakdale's counterproposal of 299C2 to Lafayette could not be considered because it was in conflict with a timely filed counterproposal, submitted in Docket 87-104, to substitute Channel 299A for Channel 225A in Erath, Louisiana. Oakdale contends that since the original Notice of Proposed Rule Making (NPRM) in Docket 87-104 gave Oakdale "no hint that either Channel 299 or the current Channel 225A allotment would be involved in that proceeding," Oakdale was thereby deprived of adequate notice in a manner inconsistent with the Administrative Procedure Act (APA). Specifically, Oakdale contends that the NPRM in Docket 87-104 failed to provide it with an adequate basis either for knowing or foreseeing that Channel 299A had been proposed or could be proposed as a substitute for Channel 225A at Erath, and thus for participating and presenting information relevant to that proposal. Oakdale thus implies that if the NPRM in Docket 87-104 had provided notice of the channel substitution at Erath, then Oakdale would have responded appropriately by proposing the substitution of Channel 299C2 in Lafayette in a timely manner in Docket 87- 104. As authority for its contention that the NPRM in Docket 87-104 violated its rights under the APA, Oakdale cites *National Black Media Coalition v. FCC*, 791 F.2d 1016 (2d. Cir. 1986) and *Chocolate Manufacturers Association v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985). Based on these cases, Oakdale maintains that it was not given adequate notice in this matter because if the final rule adopted in Docket 87-104 were to allot Channel 299A to Erath, that result would not be the "logical outgrowth" of the notice. *See* 791 F.2d at 1022; 755 F.2d at 1105. Oakdale also cites *AFL - CI0 v. Donovan*, 757 F.2d 330 (D.C. Cir.1985), and *Powell v. Andrus*, 631 F.2d 699 (10th Cir. 1980) as the basis for its position that the NPRM adopted in Docket 87-104 provided insufficient notice because if the final rule were to allot Channel 299A to Erath, that rule would "depart too sharply from the terms and substance" of the NPRM in that proceeding.

10. Oakdale next argues that because the NPRM in Docket 87-104 violated its notice rights under the APA, and because Oakdale did file its proposal for Channel 299C2 at Lafayette before the August 7, 1987, deadline established in a June 23, 1987 public notice that first provided if with notice that 299A was under consideration at Erath, Oakdale was entitled to have its proposal considered on a consolidated basis. [3] Specifically, Oakdale contends that the conflict between the timely counterproposal in Docket 87-104 proposing substitution of 299A for 225A at Erath, and Oakdale's August 5, 1987 "counterproposal" suggesting 299C2 at Lafayette, should have led to the consolidation of all the affected rule making dockets into a single proceeding. Accordingly, on August 13, 1987, Oakdale filed a Motion for Consolidation in this proceeding.

11. Finally, Oakdale challenges the finding that Oakdale's proposal to substitute 299A for 238A at Lafayette was unacceptable for failure to demonstrate that 299A would meet the spacing requirements for the sites specified in the pending applications for the new Lafayette FM station. Oakdale now submits an engineering study demonstrating that 299A can be allotted without requiring any of the Lafayette applicants to move their proposed transmitter sites.

12. In their Consolidated Joint Opposition To Petitions For Reconsideration, KRTS, Voice and Henderson (Opponents) initially address Crisler's Petition. First, they reject Crisler's assertion that *Bella Vista*, *supra*, serves as precedent requiring the substitution of Channel 238C2 for Channel 238A at Lafayette. They point out that while the *Report and Order* in this proceeding was released on December 10, 1987, the Report and Order in *Bella Vista* was not released until December 16, 1987, and therefore was not available to function as precedent. The Opponents also contend that even if the release of *Bella Vista* had pre-dated the *Report and Order*, that decision is inapposite. They distinguish the cases on the ground that in *Bella Vista* the Class C2 station had been proposed as a first FM service to Bella Vista, Arkansas, and that, therefore, unlike the matter before us, no filing window had been opened, no applications had been received, no hearing designation order had issued, and no applicants had objected to the opening of a second filing window for the proposed upgrade.

13. Moreover, the Opponents rebut Crisler's argument challenging the denial of Crisler's petition based upon the administrative inefficiency of opening a new filing window for the upgraded channel. The Opponents agree with the *Report and Order*'s position that it would be unduly burdensome to the Commission if it re-opened the window, to have to repeat the processing and designating for hearing of the seventeen then pending applications for Channel 238A and any new ones. The Opponents add that, if a new window were opened, an undue burden would fall on the original seventeen applicants as well. Each such applicant had paid a6,000.00 fee on designation, and each one would have to pay a filing fee of1,800.00 to resubmit their applications, to meet the cost of new engineering and legal fees, and to pay 6,000.00 upon redesignation. The Opponents urge that the additional financial burdens for these applicants would be particularly unfair in view of the fact that their original applications were filed in April and May of 1986. The Opponents also support the *Report and Order*'s position that the delay in provision of service resulting from the re-opening of the filing window would not be in the public interest.

14. With respect to Oakdale's Petition for Reconsideration,the Opponents contend that Oakdale's entire counterproposal in this proceeding was premised on the assumption that the Commission was irrevocably committed to replacing Channel 238A at Lafayette with a different allocation. The Opponents argue that since the *Report and Order* declined to allocate 238C2 or any other Channel, thereby leaving Channel 238A in place at Lafayette, Oakdale's assumption was mistaken. Therefore, the Opponents conclude that the counterproposal is moot and lacks any basis for consideration. The Opponents also reject Oakdale's claim that it was been deprived of adequate notice and therefore of a fair opportunity to be heard.

15. The Opponents also contend that both Oakdale's "Comments and Counterproposal" and its Motion To Consolidate in this proceeding were ineligible for consideration in Docket 87-104 for procedural reasons. First, the Opponents argue that when Oakdale filed its "Comments and Counter- proposal", that pleading did not contain a designation of Docket 87-104 in the caption. They added that copies of the Comments were not filed in Docket 87-104. On this basis, the Opponents conclude that the pleading could not be considered in 87-104 because these omissions constituted violations of Section 1.419(c) of the Commission's Rules.[4] Second, the Opponents assert that, assuming the period for filing initial comments in this proceeding ended on August 7, 1987, Oakdale did not file its Motion To Consolidate until August 13, 1987. Thus, pursuant to Section 1.420(d), the contents of the motion were ineligible to be considered as a valid counterproposal in this proceeding.

16. Finally, the Opponents submit that even if the Commission finds that the Motion for Consolidation is not procedurally defective, this proceeding should not be consolidated with the other proceedings designated in that motion. The Opponents argue that only the Erath-related proposal links this proceeding with the other proceedings, that the other proceedings are ripe for resolution, that favorable resolution would permit upgrades and improved service to the public, and that there is neither need nor justification to delay the other proceedings by consolidating them with this proceeding and thereby to delay institution of needed service to the communities involved.

17. Jennings opposes the Petitions for Reconsideration on the ground of the administrative efficiency of the allotment process. Jennings indicates that the benefits of permitting consideration without delay, both of Jennings' proposed upgrade and the related upgrades and allotment changes in MM Dockets 87-104, 87-208 and 87-276, would include not only the upgrade of several stations but also the establishment of one allotment in a presently unserved community.[5] Jennings contends that the petitions in the Lafayette, Louisiana, proceeding before us are too tenuously related to the foregoing Dockets to be allowed to piggyback onto those Dockets. Jennings warns that the Rule Making process itself would be harmed by chronic delays if the Commission were to pursue a general policy of permitting such tangentially related proposals to become consolidated.

18. In its Reply to Consolidated Joint Opposition To Petitions For Reconsideration, Oakdale disputes the Opponents' argument that Oakdale mistakenly assumed that the Commission was committed to the replacement of Channel 238A at Lafayette. Oakdale states that, to the contrary, it had anticipated that the Commission would not consider the replacement of the current allotment with another Class A channel. Oakdale indicates that, because it had indeed anticipated that decision, it decided to file its counterproposal suggesting the substitution of Channel 299A for Channel 238A at Lafayette. Oakdale reiterates its contention that 299A could be so substituted in conformity with all spacing requirements. Moreover, it asserts that Channel 299A was entitled to consideration as a substitute for 238A at Lafayette despite the determination in the *Report and Order* not to upgrade 238A to a Class C2 station.

19. Oakdale characterizes as "specious and fallacious" the Opponents' argument that Oakdale expressed no interest in Docket 87-104 until it filed it Consolidation Motion on August 13, 1987. Oakdale admits that it did not list Docket 87-104 in the caption of its August 5, 1987 pleading, but explains that this omission took place because the Commission's data base had not been updated to reflect the Channel 299A proposal at Erath when Oakdale prepared its counterproposal. Oakdale contends that any technical defect that may have been created as a result of the failure to include Docket 87-104 in the counterproposal caption or to furnish the Commission with additional copies of the pleading when it was initially filed was remedied because Oakdale did serve copies of the counterproposal on all interested parties and did specifically direct the Commission's attention to it promptly after the June 23, 1987 Public Notice first informed Oakdale of the Erath proposal involving Channel 299A. For Oakdale, the "critical fact" was neither the docket number listed on its counterproposal, nor the number of copies of the counterproposal tendered to the Commission, but rather the date (August 5, 1987) on which the counterproposal was filed.[6] Oakdale states that one of the Opponents, KRTS, concedes that Oakdale's "proposal" to allot Channel 299A at Lafayette was filed before what Oakdale describes as the applicable cut-off date in Docket 87-104. Oakdale thus concludes that because that "proposal is mutually-exclusive with the use proposed for Channel 299 in MM Docket 87-104, both proposals must be considered simultaneously."[7] In support of this position, Oakdale refers without discussion to *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

20. Based on the foregoing, Oakdale states that the Commission should have considered the substitution of Channel 299A for Channel 238A at Lafayette to permit Oakdale to upgrade Station KICR-FM at Oakdale and that the Motion for Consolidation of Docket 87-196 with the proceedings involving or related to the use of Channel 299A at Erath should have been granted. Accordingly, Oakdale requests that its pending Petition for Reconsideration should be granted and that a further notice of rule making should be issued pursuant to Section 1.421 of the rules with respect to Oakdale's proposals.

21. On February 4, 1988 Crisler submitted a Letter to Mr. Edward J. Minkel, Managing Director, Federal Communications Commission. Therein, Crisler requested that the Commission reinstate Crisler's application in MM Docket No. 87-449, in which applications for the Lafayette allotment are under consider- ation or, alternatively, that the Commission authorize a general reopening of the filing window in that Docket for any applicants. Crisler states that its application in that Docket has been dismissed for failure to pay a fee. Crisler contends that the dismissal of its application was a result of the Commission's violation of Crisler's right to due process. Specifically, Crisler alleges that on December 10, 1988, its application in Docket 87-449 was dismissed by the Administrative Law Judge for non-payment of a fee, that on December 23, 1987, Mr. Minkel sent Crisler a letter denying Crisler's fee waiver request, that on January 10, 1988, Crisler received Mr. Minkel's letter, and that Crisler received no notice of the Judge's dismissal of his application or of Mr. Minkel's denial of his fee waiver request until it was too late to file a timely response to either action.

22. Crisler also submitted a Motion To Stay All Dates requesting that the Commission "stay any further processing activity in Dockets 87-104, 87-208, and 87-276 pending action or final review in this proceeding." In support of his Motion, Crisler references the petitions for reconsideration in this proceeding and notes that the Commission's review of proposals for Channel 299 at Erath and Lafayette provides a common link between the four allegedly interrelated Dockets. Finally, Crisler acknowleges that if the Commission denies Oakdale's Petition For Reconsideration, Crisler's Motion To Stay All Dates would thereby be rendered moot.

DISCUSSION

23. The Petitions For Reconsideration of both Crisler and Oakdale, and Oakdale's Motion For Consolidation, will be denied.

24. With respect to Crisler's petition, we are in agreement with all arguments opposing that petition which were advanced by the Opponents. We agree with the Opponents that, even if *Bella Vista* had pre-dated the *Report and Order*, that case would not have been apposite. The *Bella Vista* proceeding did not involve a channel for which designated applications were pending and in which several applicants objected to the opening of a new filing window on the proposed upgrade. Since *Bella Vista* did not consider the post-designation administrative burden upon the Commission of simultaneously reprocessing existing applications and processing new applications, that decision is not relevant to the fundamental issue which the *Report and Order* resolved. Further, we think it warranted to adopt, as part of the basis for our decision to deny Crisler's Petition For Reconsideration, the Opponents' extension of the administrative inefficiency argument which was the determinative consideration in the *Report and Order*. In the *Report and Order*, we emphasized, as a reason for not re-opening the filing window, that it would be inefficient to require Commission staff to repeat the phase of processing applications for designation. We accept the Opponents' complementary argument that the opening of a filing window would further render the administrative process inefficient by imposing unduly burdensome costs on the existing applicants as well.

25. We find Crisler's remaining arguments, though not specifically opposed by the Opponents, to be equally without merit. First, we reject in its entirely Crisler's contention that because of our allegedly improper overruling of the *Bella Vista* "precedent", and because of the consequent denial of the proposed upgrade of a Channel 238A, Lafayette has been unjustifiably deprived of additional wide area FM service. Our decision herein does not deprive an unserved or underserved community of any consideration to which it is entitled. Second, we find no basis for accepting Crisler's argument that the *Report and Order* in effect overruled the Commission's policies favoring upgrades and that therefore parties who in the future seek upgrades will be precluded. The *Report and Order* did not formulate and address any issues relevant to possible modifications of existing general Commission policies concerning upgrades. Therefore Crisler's argument, that future preclusion of upgrades will result from our alleged--but non-existent--"overruling" of upgrade policies, is completely without foundation. Finally, we reject Crisler's unelaborated argument that Section 307(b) of the Communications Act compels a different result in this case.

26. Oakdale's Petition For Reconsideration and its Reply to Consolidated Joint Opposition to Petitions For Reconsideration are premised on an incorrect interpretation of the procedures which govern the consideration of filings submitted in response to notices of proposed rule making issued pursuant to Sections 1.411 to 1.420 of the Commission's Rules. Oakdale relies on the assumption that the pleading which Oakdale submitted on August 5, 1987 in this proceeding, in response to a public notice issued on July 23, 1987 in Docket 87-104, should have been treated as a valid counterproposal fully eligible for consideration in Docket 87-104. Oakdale's belief in this regard is wholly unfounded. The governing procedure is contained in Section 1.420(d):

> "Counterproposals shall be advanced in initial comments only and will not be considered if they are advanced in reply comments."

Oakdale's August 5, 1987, "Comments and Counterproposal", was filed well after the cut-off date (June 12, 1987) for initial comments in Docket 87-104. Therefore, Oakdale's August 5, 1987 proposal to substitute Channel 299C2 at Erath was, in relation to Docket 87-104, merely a reply comment which was in conflict with a timely filed counterproposal (299A for 225A at Erath) in that proceeding. Thus, pursuant to Section 1.420(d), after June 12, 1987, Oakdale's August 5, 1987 pleading could not be considered as a timely and valid counterproposal in Docket 87-104.

27. However, Oakdale asserts that the notice published in the NPRM in Docket 87-104 was inadequate under APA standards to enable it to foresee or anticipate that a

proposal to allot Channel 299 at Erath could receive consideration in that Docket, and that therefore Oakdale was denied an opportunity to participate in and present proposals relevant to that Docket. We reject such assertions because the provisions of Section 1.420(d) are fully explained and clarified by paragraph 3 of the standardized Appendix which is universally published with all NPRMs issued as the initial step in the allotment process. We find that that part of the Appendix is more than ade- quate to provide interested parties with the notice to which they are entitled under the APA. Its provisions are as follows:

> "Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding. (a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.) (b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket. (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved."

Commission precedent already holds that these rules will be strictly enforced. In *Implementation of BC Docket No. 80 - 90 to Increase the Availability of FM Broadcast Assignments*, 2 FCC Rcd. 1290 (1987), the Commission clarified the rationale for its insistence upon this approach.

> "The Commission's procedural rules do not contemplate the filing of counterproposals after the comment date. The purpose of these rules is to maintain administrative finality, which supports the freezing of the administrative record at a predetermined date and counterproposals filed after that are intended to be precluded. *See , Valley Telecasting Co., Inc. v FCC*, 336 F.2d 914 (D.C. Cir. 1974); *The Western Connecticut Broadcasting Co.*, 69 FCC 2d 1980."

2 FCC Rcd. at 1291. The U.S. Circuit Court of Appeals has held that the Commission's adherence to its own rules and regulations is necessary to preserve "the orderliness and predictability which are the hallmarks of lawful administrative action". *See Reuters Ltd. v. FCC*, 781 F.2d 946, 951 (2d. Cir. 1986). Suspending the operation of 1.420(d) whenever a proposal filed after the cut-off date for initial comments is alleged to have deserved consideration before that date would destroy the value of 1.420(d) as a source of administrative finality in the allotment process.

28. Moreover, no violation of the APA notice standard occurred in Docket 87-104. The relevant Section of the APA requires an agency to give advance warning of proposed informal rule making by publishing in the Federal Register a notice containing "either the terms or the substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. Section 553(b)(3). In the D.C. Circuit, the test used to determine whether notice issued pursuant to 553(b)(6) is adequate is "whether the agency's notice would fairly apprise interested persons of the subjects and issues of the rule making". *See Small Refiner Lead Phase - Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (*Small Refiner).* That test has recently been applied in two proceedings involving the Mass Media Bureau of this Commission. *See National Black Media Coalition v. FCC*, 791 F.2d 1016 (2d. Cir. 1986)(*NBMC ' 86)* ; *see also National Black Media Coalition v. FCC*, 822 F.2d 277 (2d. Cir. 1987)(*NBMC ' 87).* [8] The earlier decision focused on the situation where the initially proposed rule neither mentioned, suggested the possibility of, or otherwise implied the eligibility for consideration of, an option later adopted in the final rule. The Court found that, in that situation, interested parties were given no notice that that option might be adopted. Therefore the Court struck down the final rule because necessarily it was based on a failure to take into account those relevant factors which would have emerged in comments if the commenting interested parties had known that the option embodied in the final rule had been under consideration. *NBMC ' 86*, 791 F.2d. at 1022. The later decision established as a minimum requirement for proposed rules that interested parties "be placed on notice of the possibility" that an option could be adopted in the final rule. *NBMC ' 87*, 822 F.2d at 283.

29. The original NPRM in 87-104 must be read in conjunction with Section (c) of paragraph 3 of the Appendix, which states unambiguously that the Commission "may be led by a counterproposal to allot a different channel than was requested for any of the communities involved." The NPRM in that Docket satisfies the "fair apprisal" test of *Small Refiner* both in its original terms (see paragraph 28, *supra),* and as applied in *NBMC ' 86* and *NBMC ' 87*. The NPRM did not withold mention of a specific option, thereby inducing interested parties first to assume the option would not be considered, and then to be surprised if and when that option were adopted as a final rule. To the contrary, the procedure announced in the NPRM and Appendix universally placed all interested parties on notice of the possibility that options which were not mentioned in the NPRM, and which propose community/channel matchups not requested prior to the release of the NPRM, would be considered as valid counterproposals if submitted prior to the cut-off date for initial comments. Such a procedure places a burden of anticipating a variety of options on interested parties. However, such a burden is impartially and equally imposed on all interested parties, and precedent makes clear that the burden is by no means extraordinary. The APA "does not require an agency to publish in the Federal Register in advance every precise proposal which it may ultimately adopt as a rule." *See Spartan Broadcasting Company v. FCC*, 619 F.2d. 314, 321 (1980).

30. Oakdale further argues, with respect to the APA notice issue, that the allotment of Channel 299A at Erath, if effectuated, would violate the requirement that "where the change between the proposed and final rule is [alleged by an interested party aggrieved thereby to be] important, the question for the Court is whether the final rule is a logical outgrowth of the rule-making proceeding." *AFL - CIO v. FCC*, 757 F.2d 330, 338 (2d. Cir. 1985). Even if it is assumed that the allotment of Channel 299A to Erath will occur, we do not believe that result would violate the

logical outgrowth test, given the provisions of Section 1.420(d). The geographical location of Erath and the nature of the counterproposal to allot Channel 299A at that community, in relation to the proposals set forth in the NPRM in Docket 87-104, made it foreseeable that Channel 299A might be allotted to Erath. Erath, Louisiana and Oakdale, Louisiana are approximately equidistant from Jennings, Louisiana, the first community mentioned in the NPRM. Furthermore, Jennings is closer to Erath and to Oakdale than it is to either Groves, Texas or Nederland, Texas, the two other communities listed in the NPRM. Similarly, the counterproposal suggesting allotment of Channel 299A to Erath was intended to facilitate upgrades which were explicitly proposed in the original NPRM. Thus, the basic purpose (alloting upgrades) of the NPRM was not later contradicted by the counterproposal. Second and more importantly, however, in promulgating Section (c), the Commission could not have been more explicit in explaining that the results of the allotment process can be expected, routinely, to exceed the scope of the original NPRM if timely filed initial comments become, by operation of Section 1.420(d), counterproposals eligible for selection.

31. We believe that the remaining facet of Oakdale's inadequate- notice argument, i.e. the argument focused on the Commission's alleged failure, after June 12, 1987, to update its data base, is baseless. In its Reply to the Consolidated Joint Opposition, Oakdale admitted that it did not list MM Docket No. 87-104 in the caption of its August 5, 1987 pleading in this proceeding. However, Oakdale stated that the reason for this omission was that the Commission waited until June 23, 1987, to update its data base to reflect the proposed substitution of Channel 299A at Erath. Thus Oakdale concluded that its right to adequate notice was further eroded by Commission inaction. Oakdale's position on this issue clearly rests on the mistaken assumption that' the Commission was legally obliged to update its data base as part of its duty to provide Oakdale with adequate notice.

32. Oakdale's complaint about the Commission's failure to update its data base is unavailing. No applicable rule, regulation or law either creates a duty obliging the Commission to maintain a data base for the purpose of providing information to the public, or confers upon interested parties in allotment matters the right to rely upon information in the Commission's data base. Therefore Oakdale has no legal basis for claiming a right of reliance.[9]

33. Oakdale's Motion To Consolidate cannot be granted. The only putative link between this proceeding and any other Docket with which Oakdale seeks consolidation lies in Oakdale's proposal to allot Channel 299C2 at Lafayette. That proposal is ineligible for consideration as a counterporposal in Docket 87-104 due to the fact that it is in conflict with a timely filed and otherwise valid counterproposal in that Docket. For this reason there is no legal basis to consider consolidation. Therefore we do not find it necessary to address the alleged procedural deficiencies of that Motion.

34. Oakdale has claimed that *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), requires that Oakdale's untimely proposal in Docket 87-104 to allot Channel 299C2 at Lafayette be considered simultaneously with the timely counterproposal in that proceeding proposing the substitution of Channel 299A for Channel 225A at Erath. Since Oakdale's proposal is in conflict with the latter proposal, the two proposals cannot be so considered. Moreover, the right to joint consideration created in *Ashbacker* is conferred only upon timely applicants for already alloted facilities. *See* 326 U.S. at 333. Since Oakdale is not an applicant in any proceeding before us in this matter, and its proposal is untimely, its *Ashbacker* claim is groundless.

35. Since it is our decision herein to deny Oakdale's Petition For Reconsideration, Crisler's Motion To Stay Effective Dates is moot.

36. We find that Crisler's Letter requesting reinstatement of its application for Channel 238A, Lafayette, Louisiana, in MM Docket No. 87- 449, and the related requests in that Letter concerning a fee dispute, are properly to be considered in proceedings currently being held in that Docket and by the Managing Director.

37. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (2) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, that the aforementioned Petitions For Reconsideration by C.R. Crisler and Oakdale Limited Partnership ARE DENIED.

39. IT IS FURTHER ORDERED, That the Motion For Consolidation by Oakdale Limited Partnership IS DENIED.

40. IT IS FURTHER ORDERED, That the Motion For Stay Of Effective Dates by C.R. Crisler IS DENIED.

41. For further information concerning this proceeding, contact Belford V. Lawson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The interests of the opponents are as follows. Docket No. 87-104 is the product of the consolidation of two rule makings, RM-5617, in which Voice proposed to substitute Channel 223C2 for Channel 221A at Groves, Texas, and RM-5425, in which Jennings has petitioned to substitute Channel 223C2 for Channel 224A at Jennings, Louisiana. In MM Docket No. 87-276, at Henderson's request, the Commission has proposed to substitute Channel 221C2 for Channel 221A in Seabrook, Texas. Crisler's Petition for Reconsideration and Motion to Stay Effective Dates, and Oakdale's Petition For Reconsideration and Motion For Consolidation, both discussed infra, seek the consolidation of this proceeding with Dockets 87-104 and 87-276. It should be noted at the outset, however, that the only link between this proceeding and any of the other Dockets is created by Voice's timely counterproposal in Docket 87-104 proposing the substitution of Channel 299A for the presently unoccupied Channel 225A at Erath. This counterproposal is in conflict with Oakdale's counterproposal, timely filed in this proceeding (but untimely in Docket 87-104), to allot Channel 299C2 or Channel 299A in Lafayette.

[2] Although the record indicates that no applicant objected to the Commission proposal to upgrade the station, the applicants did oppose the Commission's requirement that the window be

reopened in order to effect the upgrade. It was to these objections that the Commission responded as one of its reasons for denying Crisler's petition to upgrade Channel 238A.

[3] Oakdale's Petition for Reconsideration consistently, but mistakenly, insists that because it filed its counterproposal in this proceeding proposing Channel 299C2 at Lafayette on August 5, 1987, two days before the August 7, 1987 deadline contained in the public notice, the proposal should be considered a timely filed initial comment in Docket 87-104. To the contrary, the provisions of Section 1.420(d) of the Commission's rules require that counterproposals be filed by the cut-off date for initial comments. Since Oakdale did not file the cited pleading before the June 12, 1987, cut-off date in Docket 87-104 for initial comments, Oakdale's August 5, 1987, filing was untimely and was ineligible for consideration as a counterproposal in Docket 87-104. The designation of a period in which to file pleadings addressing the timely counterproposal filed in Docket 87-104 did not affect the finality of the June 12, 1987, cut-off date for initial comments in Docket 87-104.

[4] Section 1.419(c) of the Commission's Rules provides as follows: "Any person desiring to file identical documents in more than one docketed rule making proceeding shall furnish the Commission two additional copies of any such document for each additional docket. This requirement does not apply if the proceeedings have been consolidated." *See* 47 C.F.R. 1.419(c).

[5] Jennings is referring to the fact that depending on the outcome of Docket 87-104, Groves, Texas might receive its first wide coverage area FM station. *See* 2 FCC Rcd. 2299 at paragraph 2.

[6] But *See* footnote 4, *supra*.

[7] *See* footnote 7, *supra*.

[8] In *NBMC ' 86*, the NPRM clearly stated that the FCC intended to adopt the minority preference policy and other nontechnical requirements for AM Foreign clear channels. However, the final rule took a contrary position. *See* 791 F.2d at 1022. In *NBMC ' 87*, the Court found that the Commission had given adequately informative advance notice of its intention to give a preference in comparative hearing to day-time only broadcasters. The Court found that the final rule actualizing that proposal was not an unnanounced departure, without adequate explanation, from the Commission's past policy of encouraging minority ownership of broadcast facilities. See 822 F.2d at 280.

[9] The Commissions's data base contains express disclaimers stating that the information is unofficial and does not give rise to a right of reliance.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-417

In the Matter of

Amendment of Section 73.606(b), RM-5931
Table of Allotments,
Television Broadcast Stations.
(Lima, Ohio, Muncie, Indiana,
Rockford, Illinois and Grand Rapids,
Michigan).

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 29, 1988; Released: July 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of WKBN Broadcasting Corporation (petitioner), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 2 FCC Rcd 6233 (1987), proposing the substitution of noncommercial educational UHF TV Channel *61 for unapplied for noncommercial educational UHF TV Channel *17 at Muncie, Indiana, and the reallotment of Channel 17 as the third commercial television channel in Lima, Ohio. In addition, show cause orders were directed to Winnebago Television Corporation, licensee of Station WTVO, Channel 17-, Rockford, Illinois, and TV 17 Unlimited, licensee of Station WXMI, Channel 17, Grand Rapids, Michigan, as to why their licenses should not be modified to specify plus and minus offsets, respectively, in lieu of their present minus and zero offsets. Comments were filed by the petitioner and by Lima Communications Corporation (WLIO), licensee of Station WLIO, Lima, Ohio, and Winnebago Television Corporation (Winnebago), licensee of Station WTVO, Rockford, Illinois. Reply comments were filed by petitioner and WLIO.

BACKGROUND

2. In 1980, Ball State University (Ball State) requested the substitution of Channel *17 for Channel *61 at Muncie, and the concurrent modification of Station WIPB's license to specify operation on the noncommercial channel in lieu of its present commercial Channel 49. The Commission adopted a *Report and Order* in July, 1981, substituting Channel *17 for Channel *61, but did not modify Station WIPB's license based on Ball States's request that the license modification be held in abeyance until such time as it could financially afford the change in operation. The *Notice* herein reiterated the Commission's general reluctance to tamper with noncommercial educational allotments, even those which are presently unused and unapplied for, citing *Houston, Texas*, 50 R.R. 2d 1420 (1982). However, we recognized that Channel 17 is the only channel which can be allotted to Lima in compliance with the Commission's minimum distance separation requirements, and that the allotment could provide the sizeable community with a second competitive television outlet. Therefore, petitioner was requested to address how its proposal would better serve the public interest than would retention of Channel *17 at Muncie. A copy of the *Notice* was also served on Ball State to provide it with an opportunity to comment on the substitution of Channel *61 for Channel *17 at Muncie. In addition, petitioner was requested to state its intention to reimburse the licensees of Stations WXMI, Grand Rapids, Michigan, and WTVO, Rockford, Illinois, for the costs involved in the change of their offset designations.

THE PLEADINGS

3. Petitioner urges the allotment of Channel 17 to Lima and reiterates its intention to apply for the channel. As requested, it also states its intention to reimburse Stations WXMI and WTVO for the costs associated with the change of their station's offset designations. Petitioner contends that the dereservation and reallotment of Channel 17 to Lima would serve the public interest since it could provide the 47,381[1] residents of Lima with a third local commercial service, as well as an additional outlet for national network programming, thus increasing program diversity. Further, the provision of this additional service would not adversely impact service at Muncie since the community would retain a reserved noncommercial allotment for possible future use. It also submits that adoption of the proposal would be fully consistent with Commission policy, citing *Seaford, DE*, 43 R.R. 2d 1551 (1978), and *Atlantic City and Camden, NJ and Philadelphia, PA*, 28 FCC 2d 694 (1971). It states that the Commission considers several factors in determining whether a noncommercial channel should be dereserved and reallotted, including: (1) whether a substitute channel is available for the deleted allotment, citing *Seaford, DE, supra*, and *Cullowhee, Andrews and Murphy, NC, Flintstone, Roswell and Young Harris, GA*, 60 R.R. 2d 784 (1986); (2) whether an alternative, non- reserved channel is available for allotment to the proposed community, citing *Vancouver, WA*, 46 R.R. 2d 1498 (1980); *New Smyrna Beach, Orlando and Winter Park, FL*, 50 R.R. 2d 1714 (1982) and *Houston, TX, supra* ; and (3) whether the channel to be dereserved and reallotted is unused and unapplied for, citing *Houston, TX, supra*. Petitioner contends that these factors are all present in this case: Channel *61 is available for allotment to Muncie, there is no other non-reserved channel which can be allotted to Lima, and Channel *17 at Muncie has been unused and unapplied for since its allotment in 1981. Petitioner notes that Lima has allotted to it three television channels, one of which is reserved and licensed to provide noncommercial educational service. Muncie has one commercial and one noncommercial educational channel.

4. WLIO contends that the petitioner has not met the burden of demonstrating how the dereservation and reallotment of Channel *17 from Muncie to Lima would better serve the public interest. WLIO points out that it operates as an NBC affiliate on Channel 35 at Lima and thus would compete with a Channel 17 station for viewers and advertising revenue. However, it states that its opposition to the proposal is based on a belief that the dereservation of Channel *17 at Muncie would be contrary to Commission policy and the public interest. WLIO submits

that no special situation exists which would warrant adoption of the pending proposal, and that while the Commission accords a top priority to the provision of a first local service, no such significance is accorded the provision of a third local commercial service, citing *Elk City, Oklahoma*, 48 FR 33487, published July 22, 1983. Further, WLIO submits that Muncie is a prospering, growing community which has supported the noncommercial programming provided by Station WIPB on Channel 49 and that this growth demonstrates a potential for future support of the station on Channel *17. It claims that this support should satisfy the Commission's inquiry into the existence of interest in use of the channel.

5. WLIO states that Muncie receives no local commercial service since its only commercial channel is used by noncommercial educational Station WIPB. In seeking the allotment of Channel *17, WLIO notes that Ball State did not withdraw its previously expressed interest in being modified to Channel *17, only stating that it would seek the license modification once its financial picture improved. WLIO argues that the present non-use of Channel *17 at Muncie is not a sufficiently compelling reason to warrant the dereservation and reallotment of Channel *17, stating that noncommercial educational channels are allotted to communities to meet not only their present needs but also future demands. Therefore, it notes that Commission policy mandates that channels which are reserved for noncommercial educational use not be dereserved, even where unused, absent special public interest justifications. Future use of Channel *17 as compared to Channel *61 is enhanced, according to WLIO, because the "superior propagation characteristics of channels in the lower portion of the UHF band" would enable Ball State to save substantial operating and maintenance costs. Since such savings would not occur if the station modifies its operation to Channel *61, WLIO argues that the deletion of Channel *17 would likely result in Station WIPB continuing to operate on Channel 49. Having stated this, WLIO then goes on to note that the Commission has consistently refused to distinguish between lower and higher UHF channels as a justification for the dereservation of noncommercial allotments. However, it argues that the Commission has recognized that the initiation of such service may be harmed if a higher UHF channel is substituted for a lower UHF channel, citing *Houston, Texas, supra*.

6. WLIO contends that the public interest would not be served by the substitution of Channel *61 for Channel *17 even if Station WIPB elects to continue providing noncommercial educational service on Channel 49. It states that the Commission has previously refused to substitute a higher reserved channel for a lower one, where the community already received one such service, so as to preserve an opportunity for a second service. In support, it cites *Ogden, Utah*, 21 R.R. 2d 1712 (1971) and *Houston, Texas, supra*. In addition, since Station WIPB operates on a commercial allotment, it argues that there is no guarantee of continued noncommercial service on Channel 49 since it is possible that a commercial operator could successfully challenge the station's license at renewal time or the licensee could sell its license to a commercial operator.

7. Winnebago also opposes the allotment of Channel 17 to Lima, stating that the change in Station WTVO's offset designation would be both costly and time consuming. It sets forth the transmission and monitoring equipment changes it believes to be necessary and expresses concern over the willingness of the cable systems which presently carry Station WTVO to make any necessary changes in their demodulators. However, barring the denial of petitioner's proposal, Winnebago requests that the ultimate licensee of Channel 17 at Lima be required to reimburse Winnebago for "all present and future costs" incurred as a result of the offset change and that compliance with the reimbursement requirement be made subject to Commission review.

8. In its reply comments, petitioner contends that WLIO's opposition to the proposal is based on a misinterpretation and misapplication of the Commission's general policy concerning the dereservation and reallotment of noncommercial educational channels. It states that it is unaware of any single Commission decision which comprehensively deals with the dereservation issue. Rather, individual decisions discuss only those issues which are dispositive in the particular rule making. Therefore, an accurate understanding of the Commission's policy in this area must be derived from considering all of the relevant Commission decisions as a whole. Petitioner goes on to state that WLIO has misinterpreted the Commission's decisions concerning dereservation and reallotment of noncommercial educational channels. Specifically, in *Houston, Texas, supra*, and *Ogden, Utah*, 45 R.R. 2d 768 (1979), it states that the dispositive issue was not the length of time that the channels had been unused and unapplied for. Rather, in *Houston* the receipt of an expression of interest in use of the educational channel was dispositive and in *Ogden* the dispositive issue was the availability of an alternative commercial channel. Petitioner agrees that if its request was based on the sole fact that Channel *17 is unused and unapplied for or that there has been no interest expressed in use of the channel since its allotment 6-1/2 years ago or that there is a substitute channel available for reservation at Muncie, sufficient reason may not be present to warrant the dereservation of Channel *17. However, the presence of all of these factors in this case, according to petitioner, supports a finding that Channel *61 should be substituted for Channel *17 at Muncie and that Channel 17 should be allotted to Lima as a commercial service.

9. Petitioner also disputes WLIO's "self-serving and wholly-unsupported" contention that the substitution of Channel *61 for Channel *17 at Muncie would diminish the chances that Ball State would seek modification of its license to the noncommercial channel, thus denying the use of Channel 49 for commercial use. It states that Ball State withdrew its request for modification at the time the channel substitution was finalized and has now reaffirmed its continuing non-interest by failing to file comments in this proceeding. As to the superior propagation characteristics of Channel 17 versus Channel 61, petitioner points out that the Commission has repeatedly stated that it does not recognize any significant propagation differences between lower and higher UHF channels, citing *Jacksonville and Palatka, Florida*, 3 R.R. 2d 1505, 1508 (1964), *Houston, Texas*, at 1423-24; and *Vancouver, Washington*, 46 R.R. 2d 1498, 1499 (1980). In fact, it submits that the Commission decision to allot Channel *17 to Muncie disregarded Ball State's assertion of superior propagation chacteristics and instead based its decision on Ball State's intention to switch channels, thus returning Channel 49 to its originally intended commercial use.

10. Additionally, petitioner disagrees with WLIO's assertion that the benefits accruing to Lima from the allotment of Channel 17 should be accorded no decisional weight.

WLIO states that in *Elk City, Oklahoma, supra*, the Commission did not recognize the provision of a third local and second commercial service as sufficient justification for dereservation. However, petitioner argues that the decision in *Elk City* turned not on the provision of a third service but on the availability of an alternative commercial channel. Petitioner recognizes that the allotment of a first local service has been deemed sufficient justification for dereservation. However, it contends that the Commission has dereserved a noncommercial channel to provide a third local commercial, and fourth television service overall, citing *Jacksonville and Palatka, Florida, supra*, and, in fact has dereserved a channel to provide a sixth local commercial service, citing *Atlantic City, New Jersey*, 21 R.R. 2d 1717 (1971). Petitioner also contends that the Commission does not need to decide which community is more deserving of the allotment since a substitute channel is available for Muncie. Thus, petitioner asserts that service to Lima can be improved while maintaining the overall balance between commercial and noncommercial channels in Muncie. It states that such a result has been found sufficient in the past to warrant grant of other dereservation decisions, citing *Atlantic City, New Jersey, supra*. Based on the above discussion, petitioner maintains that a grant of its proposal is consistent with Commission policy and would serve the public interest.

11. Finally, petitioner states that special circumstances do exist which warrant grant of the proposal. According to petitioner, the allotment of Channel 17 to Lima, as its third commercial service, would increase programming diversity in Lima by 50%. Further, this benefit can only be achieved by the allotment of Channel 17 since no other channel is available for use in the community. Moreover, this additional Lima service will have no adverse effect on Muncie, since it would retain the same mix of channels.

12. As to the opposition by Winnebago, petitioner reiterates its intention to reimburse Station WTVO for the reasonable and necessary costs involved in the change of its offset designation. However, it disputes the monetary figures which Winnebago has advanced and instead submits what it believes to be the reasonable expenses which would be incurred. It also states that its willingness to reimburse Stations WTVO and WXMI for the cost of changing offset does not extend to any costs that may relate to continued cable carriage of the signals. In the absence of any documented proof as to the disruption of cable service, and after discussions with several cable operators, petitioner believes that the cable systems will be unaffected by the offset change by Stations WTVO.

13. WLIO, in its reply comments, reasserts its contention that petitioner has failed to demonstrate that this proposal would serve the public interest. It states that petitioner urges adoption of the proposal based on the fact that Channel *17 is the only channel available for allotment to Lima. However, WLIO states that petitioner has failed to address the potential availability of Channel *57, which is allocated to Lima and has been unoccupied and unapplied for since Station WBGU changed its operation from that channel to Channel *27 at Bowling Green, Ohio. WLIO submits that the availability of Channel *57 at Lima, which has been unused and unapplied for since mid-1986, is a critical element in this proceeding because it "undermines the only arguably relevant element of a pubic interest showing conceivably available to WKBN." In addition to the failure of petitioner to address the dereservation of Channel *57 at Lima, WLIO argues that the Commission should consider the "technical difficulties" involved in the reallotment of Channel 17 to Lima, namely a 32.1 kilometer southwest site restriction to avoid a short-spacing to Channel 16 at Detroit, Michigan and to Station WXMI at Grand Rapids, Michigan, the imposition of a 6.1 kilometer southeast site restriction on the pending proposal to allot Channel 32 to London, Ohio (MM Docket 87-190), and the change in offset designation for Stations WXMI and WTVO.[2]

DISCUSSION

14. Lima (population 47,381), seat of Allen County (population 112,241), is located in northwestern Ohio, approximately 115 miles north of Cincinnati. It currently receives local commercial service from Stations WLIO, Channel 35, and WTLW, Channel 44. Lima also has allotted to it noncommercial educational Channel *57, which is unoccupied and unapplied for. Muncie has no local commercial service but receives noncommercial service from Station WIPB, licensed to Ball State University, which operates on non-reserved Channel 49. Muncie also has allotted to it noncommercial educational Channel *17, which is unused and unapplied for.

15. In adopting the *Notice of Proposed Rule Making* in this proceeding, the Commission stated that its general policy was not to look favorably upon the dereservation of lower UHF channels and the substitution of higher channels for the dereserved lower channels, even where the channels are presently unused and unoccupied. However, in light of the fact that Channel 17 is the only channel which can be allotted to Lima coupled with the non-use of the channel at Muncie, the Commission believed that the public interest would be served by affording interested parties an opportunity to address the public interest benefits accruing from adoption of the proposal. Based on a careful review of the pleadings before us, and prior Commission decisions, we find that the public interest would be served by allotting Channel 17 to Lima, as the community's third commercial allotment, and by substituting Channel *61 for Channel *17 at Muncie.

16. Television channels are allotted to communities only where a party has stated an intention to apply for the channel. As stated in all Notices of Proposed Rule Making, proponents are expected to reiterate their intention to apply for the channel, if allotted, and failure to do so may result in the denial of the request. *See Anchorage and Seward, Alaska*, 48 FR 34959, published August 2, 1983. The Commission proposed the allotment of Channel *17 to Muncie pursuant to the request of Ball State and the channel was allotted based on its statement of continuing interest and the commitment to seek the modification once its financial picture improved. In order to determine if Ball State remained committed to applying for Channel *17, the Commission served it with a copy of the *Notice of Proposed Rule Making*. Since neither Ball State nor any other party filed comments expressing an interest in use of Channel *17 at Muncie, we can only find that there is no longer any interest in use of the channel.

17. While this fact alone may not be sufficient in and of itself to warrant the action taken here, we find that reliance must also be placed on the other factors present here. First, there is no other channel available for allotment to Lima, while Channel *61 is available as a substitute at Muncie. WLIO asserts that petitioner should have proposed the dereservation of Channel *57 at Lima,

rather than the substitution of channels at Muncie, since the Lima channel is also unoccupied and unapplied for and would require no other changes in the Table of Allotments. We find this proposal to be irrelevant to the proceeding. The issue before us is not whether the allotment of a third commercial service to Lima provides a public interest benefit sufficiently compelling that it should be accomplished by depriving a community of potential noncommercial educational service, but whether the proposal provides such public interest benefits as to warrant the substitution of one noncommercial channel for another. As WLIO is aware, the Commission requires a much stronger showing of public interest benefit to dereserve a channel without replacement as opposed to the substitution of one channel for another. However, it has presented no reason why Lima should be deprived of future noncommercial educational service when a more equitable solution is available or why petitioner should be forced to pursue the more difficult avenue in order to provide a third commercial service to Lima.

18. WLIO is correct that the Commission places a higher priority on the provision of a first local service than on the provision of a third local service. However, even though the provision of a third service is not looked upon as providing the same level of public interest benefit, we nevertheless have found in the past that the diversity of programming choices which accompanies the allotment of additional channels is a worthwhile public interest benefit. *See Medford and Brookings, Oregon*, 3 FCC 2d 860 (1966). Here, we find that this benefit can be achieved without disrupting any existing service nor disturbing the existing mix of channels at any community.

19. We also disagree with WLIO that Channel *17 should be retained at Muncie due to its "superior propagation characteristics." As has been stated previously, the Commission does not recognize any significant technical difference between lower and higher UHF channels. *See Houston, Texas, supra*, and *Cookeville and Fayetteville, Tennessee*, Docket 20136, 40 FR 51043, November 3, 1975. WLIO is correct that we have, on occassion, reserved lower UHF channels in lieu of higher ones based on a finding that such an action could facilitate the provision of noncommercial service. However, these decisions were based on the existence of special circumstances, not on any inherent technical difference between the channels. *See , e. g., Alexandria, Louisiana*, 44 FR 1738, February 5, 1978. [3]

20. Finally, we find that Winnebago's opposition to the allotment based on the cost and inconvenience of changing its offset designation is also without merit. Petitioner has stipulated that it is willing to reimburse Winnebago and TV 17 Unlimited for the reasonable costs associated with the change of their offset designations. While they disagree with the cost and extent of the changes, we do not believe that it is necessary for us to make such determinations at this time. The parties should be guided in their negotiations by the Commission's decision in *Circleville, Ohio*, 8 FCC 159 (1967). However, they may seek further guidance from the Commission should they be unable to reach a mutually satisfactory agreement. Further, we note that affected licenses typically have a significant amount of time between the release of the *Report and Order* modifying their license and the actual frequency change. The Commission provides one year to effectuate the change. However, it is generally not necessary for the station to modify its operation until use of the existing frequency actually prevents the newly authorized station from beginning service. In most situations, the change can be delayed for considerably more than one year. TV Channel 17 Unlimited, licensee of Station WXMI, Channel 17, Grand Rapids, Michigan, is deemed to have consented to the change in its offset designation since it did not file comments herein.

21. Channel 17 can be allotted to Lima, Ohio, in compliance with the Commission's minimum distance separation requirements with a site restriction of 32.1 kilometers (19.9 miles) southwest to avoid a short-spacing to Channel 16 at Detroit, Michigan, which is reserved for land mobile use, and to Station WXMI, Channel 17, Grand Rapids, Michigan.[4] Channel *61- can be allotted to Muncie, Indiana, in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[5] In addition, we shall change the offset designations for Station WXMI, Channel 17, Grand Rapids, Michigan, from "zero" to "minus" and for Station WTVO, Channel 17, Rockford, Illinois, from "minus" to "plus.". However, on July 16, 1987, the Commission adopted a temporary freeze on the filing of petitions for new allotments and applications for vacant allotments where the community is located within the minimum co-channel separation distance to certain metropolitan areas. *See Order*, 52 FR 28346, July 29, 1987. Lima is located within the proscribed distance to both Cincinnati and Columbus, Ohio. Thus, no applications for Channel 17 at Lima will be accepted until further notice by the Commission.

22. Canadian concurrence in the allotments for Lima, Ohio, amd Muncie, Indiana, and the offset change for Station WXMI at Grand Rapids, Michigan, have been received since these communities are located within 250 miles of the U.S.-Canadian border.

23. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 12, 1988,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Muncie, Indiana	49, *61-
Rockford, Illinois	13, 17+, 39
Grand Rapids, Michigan	8+, 13+, 17-, *35+
Lima, Ohio	17, 35-, 44+, *57+

24. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Winnebago Television Corporation, Station WTVO, Channel 17, Rockford, Illinois, and TV 17 Unlimited, Station WXMI, Channel 17, Grand Rapids, Michigan, IS MODIFIED to specify operation on Channel 17+ in lieu of Channel 17- and Channel 17- in lieu of Channel 17, respectively, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WTVO's license or Station WXMI's license, except the channel as specified above. Any other changes, except those so

specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with the licenses of Stations WTVO and WXMI except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

25. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the following licensees:

Winnebago Television Corporation	TV Channel 17 Unlimited
P.O. Box 472	3117 Plaza Drive, NE
Rockford, Illinois 61105	Grand Rapids, Michigan 49505

26. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

27. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Population figures are taken from the 1980 U.S. Census, unless otherwise indicated.

[2] By *Report and Order* in MM Docket 87-190, adopted April 5, 1988, the Commission allotted Channel 32 to Xenia, Ohio, in lieu of London, Ohio.

[3] The Louisiana Educational Television Authority, permittee of Channel 25 at Alexandria and other educational stations operating on UHF channels below Channel 29, requested the substitution of Channel *25 for Channel *41 at Alexandria since it would permit the standardization of klystron tubes used by the educational stations licensed to the Authority. This standardization would permit the licensee to reduce its inventory needs since all its stations could interchange their equipment. In addition, the change in educational reservation reflected the actual useage of the channel.

[4] The coordinates for this allotment are North Latitude 40-35-18 and West Longitude 84-25-55.

[5] The coordinates for this allotment are North Latitude 40-11-30 and West Longitude 85-23-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-470

In the Matter of

Amendment of Section 73.202(b),	RM-5440
Table of Allotments,	RM-5762
FM Broadcast Stations.	RM-5763
(Lake Lorraine and Niceville,	RM-5764
Florida, and Evergreen, Alabama)	

SECOND REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 29, 1988; Released: July 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Further Notice of Proposed Rule Making*, 3 FCC Rcd. 74 (1988), soliciting further comments on a proposal to allot Channel 227A to Lake Lorraine, Florida, as a first FM service at the request of Michael J. Pollack (petitioner). In a *First Report and Order*, 3 FCC Rcd. 77 (1988), the Commission allotted Channel 262A to Niceville, Florida in lieu of Channel 227A, and dismissed as unacceptable the counterproposal of Mac Carter for Channel 262C2 at Georgia, Alabama.

2. Although the *Notice* indicated that Channel 227A could be allotted to Lake Lorraine consistent with the spacing requirements of Section 73.207 of the Commission's Rules, Emerald Coast Broadcasting (Emerald) in comments to the *Notice* argued against the allotment, based on lack of requisite indicia for community status. Thus, in a *Further* Notice we questioned whether Lake Lorraine is a bona fide community for allotment purposes, and requested the petitioner to provide sufficient information to demonstrate whether Lake Lorraine has businesses, social organizations or governmental units that identify themselves therewith, to establish community status. Petitioner did not respond to the Notice.

3. Thus, we find that the petitioner has failed to demonstrate as requested that Lake Lorraine qualifies as a community for allotment purposes. Therefore, it is not appropriate to allot Channel 227A to Lake Lorraine.

4. In view of the above, IT IS ORDERED, That the petition of Michael J. Pollack requesting the allotment of Channel 227A to Lake Lorraine, Florida, IS HEREBY DISMISSED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-554

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Titusville, Florida) — RM-5999

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 23, 1988; Released: July 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd. 7417 (1987), issued in response to the petition of Frazer Broadcasting Corporation (petitioner), licensee of Station WSCF(FM), Titusville, Florida, proposing the substitution of Channel 251C2 for Channel 252A, and modification of its Class A license, accordingly. In response to the *Notice*, petitioner filed comments restating its interest in Channel 251C2.

2. We believe that the public interest would be served by substituting Channel 251C2 for Channel 252A at Titusville, Florida, in order to provide an increase in coverage by Station WSCF(FM). As stated in the *Notice*, the transmitter site for Channel 251C2 is restricted to 17.8 kilometers (11 miles) east of the city to meet the spacing requirements to a construction permit issued to Station WPVC(FM), Winter Haven, Florida (BPH 870819MR).[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Titusville, Florida	251C2

4. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Frazer Broadcasting Corporation, for Station WSCF(FM), Channel 252A, Titusville, Florida, IS MODIFIED to specify operation on Channel 251C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates for the restricted site are 28-37-00 and 80-38-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-507

In the Matter of

Amendment of Section 73.202(b),	RM-5997
Table of Allotments,	
FM Broadcast Stations.	
(Mountain Home, Idaho)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 29, 1988; Released: July 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd. 6921 (1987), proposing to substitute Channel 256C for Channel 257A at Mountain Home, Idaho, at the request of the Mountain Valley Broadcasting (petitioner). The *Notice* also proposed to modify petitioner's license for Station KJCY(FM) to specify the Class C channel. Petitioner filed supporting comments.

2. Petitioner in its comments stated a desire to be modified to Channel 256C1 rather than Channel 256C as proposed by the *Notice*. For a Class C1 facility at Mountain Home petitioner proposes to utilize its Class A transmitter, thereby eliminating the need for a 9.8 kilometers site restriction in order to meet the spacing requirements to Station KWEI-FM, Channel 257A at Weiser, Idaho.[1]

3. We believe that the public interest would be served by substituting Channel 256C1 for Channel 257A at Mountain Home, in order to provide an increase in coverage by Station KJCY(FM). We shall modify the license of Station KJCY(FM) to specify operation on Channel 257C1 pursuant to Section 1.420(g) of the Commission's Rules. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Mountain Home, Idaho	256C1

4. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KJCY(FM), Mountain Home, Idaho, IS MODIFIED to specify operation on Channel 256C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates for Channel 256C1 at the present Class A site for Station KJCY(FM) are 43-12-29 and 115-34-19.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-606

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, RM-6023
FM Broadcast Stations.
(Rexburg, Idaho)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 29, 1988; Released: July 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd. 252 (1988), proposing to substitute Channel 251C2 for Channel 252A at Rexburg, Idaho, and to modify the license for Station KKQT(FM) to specify operation on the Class C2 channel. The *Notice* was issued at the request of the licensee, Tri County Radio Corporation (petitioner). Comments were filed by the petitioner restating its interest in the channel.

2. After consideration of the proposal, we conclude that the public interest would be served by the channel substitution at Rexburg, in order to provide the community with its second wide coverage area FM station. We shall modify the Class A license for Station KKQT(FM) at Rexburg to specify operation on the Class C2 channel as requested. The allotment of Channel 251C2 at Rexburg, can be made in compliance with the minimum distance separation requirements. Petitioner proposes to upgrade at its present Class A site.[1]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to following community:

City	Channel No.
Rexburg, Idaho	232A, 251C2, 263C1

5. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KKQT(FM), Rexburg, Idaho, IS MODIFIED to specify operation on Channel 251C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates for Channel 251C2 at Rexburg are 43-48-55 and 111-46-09.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-456

In the Matter of

Amendment of Section 73.202(b), RM-5917
Table of Allotments,
FM Broadcast Stations.
(Port Charlotte, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 29, 1988; Released: July 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd. 6539 (1987), proposing to substitute Channel 261C1 for Channel 261A at Port Charlotte, Florida, at the request of the licensee of Station WEEJ(FM), Charlotte Broadcasting Company (petitioner). The *Notice* also proposed to modify the license for Station WEEJ(FM) to specify the Class C1 channel. Petitioner filed supporting comments.

2. After consideration of the proposal, we conclude that the public interest would be served by the channel substitution at Port Charlotte, in order to provide an increase in coverage by Station WEEJ(FM). The substitution can be made in compliance with the minimum distance separation requirements at petitioner's proposed site 12.5 kilometers (7.8 miles) southeast of the city.[1] In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station WEEJ(FM) to specify operation on Channel 261C1.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 12, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Port Charlotte, Florida	261C1

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Charlotte Broadcasting Company, IS MODIFIED to specify operation on Channel 261C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates for Channel 261C1 at petitioner's requested site are 26-53-40 and 82-01-10.

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